



STATE OF ALASKA
Legislative Affairs Agency

A
REPORT TO THE
THIRTIETH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
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State Capitol
Juneau, Alaska 99801-1182

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THIRTIETH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals,
Delayed Enactments, or Delayed Amendments
and
Examining Court Decisions
and Opinions of the Attorney General
Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between February 28, 2019, and March 1, 2020, according to laws enacted before the 2019 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2017, and September 30, 2018,

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 2017, and September 30, 2018.

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December 2018



INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

- (1) the courts and agencies are properly implementing legislative purposes;
- (2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;
- (3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;
- (4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The review also covers formal and informal opinions of the Attorney General. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2019 Legislature, will be repealed or amended before March 1, 2020, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions, federal court decisions, and opinions of the Attorney General were prepared by Claire Radford, and Linda Bruce, Legislative Counsel, and Susie Lemons, Assistant Revisor of Statutes. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

December 2018



TABLE OF CONTENTS

DELAYED REPEALS, ENACTMENTS OR AMENDMENTS taking effect between February 28, 2019 and March 1, 2020 according to laws enacted before the 2019 legislative session1

ANALYSIS OF COURT CASES

ABSENT AGREEMENT BETWEEN THE PARTIES, A DEFENDANT MAY NOT MAKE EX PARTE CONTACT WITH A PLAINTIFF'S TREATING PHYSICIAN WITHOUT A COURT ORDER..... 3

A SECOND MOTION FOR RECONSIDERATION IS PERMISSIBLE WHEN THE SECOND REQUEST ADDRESSES NEWLY-ARISEN PROBLEMS..... 4

**Art. I, sec. 5, Constitution of the State of Alaska
AS 15.25.030(a)(16) 5
DEMOCRATIC PARTY HAS AN ASSOCIATIONAL RIGHT UNDER THE CONSTITUTION TO ALLOW INDEPENDENT CANDIDATES IN ITS PRIMARIES.**

**Art. I, sec. 9, Constitution of the State of Alaska
AS 11.41.210(a)(1)
AS 11.41.500(a)(3) 5
WHEN THE STATE RELIES ON THE INFLECTION OF SERIOUS PHYSICAL INJURY TO ELEVATE SECOND-DEGREE ROBBERY TO FIRST-DEGREE ROBBERY, ALASKA'S DOUBLE JEOPARDY CLAUSE PROHIBITS SEPARATE CONVICTIONS FOR ASSAULT BASED ON THE SAME INJURY.**

**Art. XI, sec. 7, Constitution of the State of Alaska 6
AN INITIATIVE EFFECTS AN APPROPRIATION IF IT DOES NOT ALLOW THE LEGISLATURE ULTIMATE DECISION-MAKING AUTHORITY TO USE SPECIFIC PUBLIC ASSETS FOR SPECIFIC PURPOSES.**

**Alaska Appellate Rule 404(f) 7
A PARTY MAY SEEK RECONSIDERATION OF AN APPELLATE COURT ORDER DENYING AN ORIGINAL APPLICATION THAT DENIES RELIEF BUT ISSUES A DECISION ON THE MERITS OF THE PARTY'S CLAIM.**

Alaska Civil Rule 3(c)(1)
Alaska Civil Rule 12(b)
AS 22.10.040 8
THE PLAINTIFF BEARS THE BURDEN OF PROVING PROPER VENUE; FOR A BREACH OF CONTRACT CLAIM, VENUE IS PROPER IN A JUDICIAL DISTRICT WHERE A SUBSTANTIAL PART OF THE EVENTS GIVING RISE TO THE CLAIM OCCURRED.

AS 40.25.120(a)(4)
Alaska Civil Rule 26(b)(3)
Alaska Rule of Evidence 503(b) 9
ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES ARE EXCEPTIONS TO THE PUBLIC RECORDS ACT.

Alaska Criminal Rule 23(a)..... 10
CRIMINAL RULE 23 REQUIRES GOVERNMENT AND COURT APPROVAL OF A MISDEMEANOR DEFENDANT'S WAIVER OF JURY TRIAL.

Alaska Rule of Evidence 505 11
MARITAL COMMUNICATIONS PRIVILEGE UNDER EVIDENCE RULE 505(B)(1) ONLY APPLIES TO CONFIDENTIAL COMMUNICATIONS.

AS 08.45
12 AAC 42.990 12
REGULATION CONSISTENT WITH STATUTE, WHICH DOES NOT CONFER PRESCRIPTIVE AUTHORITY ON NATUROPATHS.

AS 09.45.235 13
THE RIGHT TO FARM ACT DOES NOT SHIELD A PROPERTY OWNER FROM A NUISANCE LIABILITY CLAIM FOR A NUISANCE EXISTING ON THE PROPERTY BEFORE THE AGRICULTURAL FACILITIES OR OPERATIONS.

AS 09.55.570
AS 13.16.015
AS 13.16.245 - 13.16.440 15
ONLY AN ESTATE'S PERSONAL REPRESENTATIVE MAY APPEAR IN COURT ON BEHALF OF THE ESTATE.

AS 09.60.010 16
FOR PURPOSE OF AWARDING ATTORNEY'S FEES, FRIVOLOUSNESS IS EVALUATED BY CLAIM AND A CLAIM IS NOT FRIVOLOUS UNLESS THE LITIGANT ABUSES THE JUDICIAL PROCESS OR EXHIBITS IMPROPER OR ABUSIVE PURPOSE.

AS 09.65.070(d)(2).....	17
A MUNICIPALITY ENJOYS IMMUNITY ONLY FOR "PLANNING" DECISIONS.	
AS 11.41.110(a)(3).....	18
SURVIVING ACCOMPLICES TO A FELONY MAY BE PROSECUTED FOR MANSLAUGHTER.	
AS 11.41.220(a)(2).....	19
REPEATED THREATS REQUIRE A CLEAR BREAK IN CONTEXT AND THE PASSAGE OF SUFFICIENT TIME BETWEEN DIFFERENT THREATENING STATEMENTS.	
AS 11.46.310(a)	
AS 11.81.900(b)(5)	
AS 11.56.800(a)(2).....	21
BICYCLE STORAGE SHED IS A "BUILDING" UNDER BURGLARY STATUTES; MAKING A FALSE REPORT REQUIRES OBJECTIVELY CREATING A REASONABLE LIKELIHOOD POLICE WILL ACT.	
AS 11.56.757	
AS 12.55.027(d).....	22
A DEFENDANT WHO VIOLATED CONDITIONS OF BAIL RELEASE IN A NON-CRIMINAL WAY BETWEEN JULY 12, 2016, AND NOVEMBER 27, 2017, MAY RECEIVE CREDIT FOR ELECTRONIC MONITORING.	
AS 11.56.760	
AS 44.41.035	23
DNA SAMPLE REQUIREMENT IS NOT AN EX POST FACTO LAW.	
AS 12.55.027(d).....	24
A DEFENDANT'S COMMISSION OF A NEW CRIME WHILE ON ELECTRONIC MONITORING REMOVES A TRIAL COURT'S ABILITY TO GRANT CREDIT AGAINST A SENTENCE OF IMPRISONMENT.	
AS 12.55.027(d).....	26
A POST-JUDGMENT MOTION FOR SENTENCING CREDIT IS A CRITICAL STAGE OF A CRIMINAL PROCEEDING FOR WHICH A DEFENDANT IS ENTITLED TO COUNSEL.	
AS 12.55.125(o).....	26
FORMER SENTENCING PROVISION REQUIRES PROBATION FOR A MANDATED PERIOD FOR A SEXUAL FELONY CONVICTION EVEN WITHOUT IMPOSITION OF A SUSPENDED SENTENCE.	

AS 12.55.135(a)	
AS 28.35.400	28
THE PRESUMPTIVE 30-DAY SENTENCING CEILING ESTABLISHED UNDER AS 12.55.135(a) APPLIES TO RECKLESS DRIVING UNDER STATE LAW AND ANCHORAGE MUNICIPAL LAW.	
AS 12.55.145(a)(1)(B).....	29
A FELONY DUI CONVICTION FROM MONTANA IS A "PRIOR FELONY CONVICTION" FOR PURPOSES OF AS 12.55.145(a)(1)(B).	
AS 12.55.155(c)(18)(A).....	30
THE STATUTORY AGGRAVATING FACTOR FOR FELONIES INVOLVING DOMESTIC VIOLENCE DOES NOT APPLY IF THE VICTIM'S IDENTITY AND RELATIONSHIP TO THE DEFENDANT HAS NO BEARING ON THE DEFENDANT'S BLAMEWORTHINESS OR DEGREE OF DANGEROUSNESS.	
AS 12.63.100(6)(C)	31
REGISTRATION AS A SEX OFFENDER IN ALASKA IS ONLY REQUIRED FOR THOSE OUT-OF-STATE CONVICTIONS WITH ELEMENTS THAT ARE CATEGORICALLY ALIKE WITH NO SIGNIFICANT DIFFERENCES TO THE ELEMENTS OF AN ALASKA STATUTE.	
AS 13.12.114	
AS 13.12.403	
AS 25.20.050	32
PATERNITY DETERMINATIONS IN PROBATE PROCEEDINGS DO NOT REQUIRE A SEPARATE CAUSE OF ACTION.	
AS 15.13.145(a)(4).....	33
UNDER AS 15.13.145, EVIDENCE OF ACTUAL INFLUENCE FROM INAPPROPRIATE USE OF PUBLIC MONEY IS NOT REQUIRED, AND APOC INTERPRETATION OF "MONEY" TO INCLUDE PROPERTY AND ASSETS IS REASONABLE.	
AS 18.23.030	34
MEDICAL PEER REVIEW PRIVILEGE STATUTE DOES NOT EXTEND TO PERSONAL KNOWLEDGE AND OUTSIDE OBSERVATIONS OR MATERIALS.	
AS 18.66.100	35
A NEW DOMESTIC VIOLENCE PROTECTIVE ORDER REQUIRES THE SHOWING OF A NEW INCIDENT OF DOMESTIC VIOLENCE.	

AS 18.66.120	36
A COURT MAY NOT CHANGE OR ELIMINATE THE FACTUAL FINDINGS ON WHICH A FINAL AND UNAPPEALED LONG-TERM PROTECTIVE ORDER WAS PREDICATED.	
AS 18.80.060	
AS 44.62.590	37
THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS MAY EXCLUDE THIRD PARTIES FROM INVESTIGATIVE INTERVIEWS.	
AS 18.85.100(a)(2)	
AS 44.21.410(a)(5)	37
THE PUBLIC DEFENDER AGENCY AND THE OFFICE OF PUBLIC ADVOCACY MUST PAY NECESSARY TRIAL TRAVEL EXPENSES FOR THEIR INDIGENT DEFENDANTS WHO ARE NOT IN CUSTODY AND CANNOT AFFORD TRAVEL.	
AS 23.30.008(d).....	38
THE SHIELD AGAINST AN AWARD OF ATTORNEY'S FEES UNDER THE ALASKA WORKERS' COMPENSATION ACT EXTENDS TO CLAIMANTS OTHER THAN INJURED WORKERS.	
AS 23.30.015(h).....	39
UNDER AS 23.30.015(h), "COMPROMISE" IS AN AGREEMENT TO SETTLE A REAL OR SUPPOSED CLAIM IN WHICH EACH PARTY SURRENDERS SOMETHING IN CONCESSION TO THE OTHER.	
AS 23.30.055	40
THE ALASKA WORKERS' COMPENSATION ACT DOES NOT PRECLUDE COMPENSATION FOR ALL INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS.	
AS 33.30.295	
22 AAC 05.480	41
ISSUE EXHAUSTION REQUIREMENT DOES NOT NECESSARILY APPLY TO A PRISON DISCIPLINARY APPEAL.	
AS 34.40.110(k).....	42
AS 34.40.110(k) CANNOT UNILATERALLY DEPRIVE OTHER STATE AND FEDERAL COURTS OF JURISDICTION.	

AS 40.25.120(a)(6)(A)
AS 40.25.122 43
THE PUBLIC RECORDS ACT LITIGATION EXCEPTION ONLY APPLIES TO LITIGATION INVOLVING A PUBLIC AGENCY AND THE LAW-ENFORCEMENT-INTERFERENCE EXCEPTION ONLY APPLIES IF THE STATE SHOWS DISCLOSURE COULD REASONABLY BE EXPECTED TO INTERFERE WITH ENFORCEMENT PROCEEDINGS.

AS 45.45.010 44
AS 45.45.010 DOES NOT SET A MAXIMUM INTEREST RATE FOR A CONTRACT OR LOAN COMMITMENT WITH AN EXPRESS INTEREST RATE AND PRINCIPAL THAT EXCEEDS \$25,000.

AS 47.10.080(f)
AS 47.10.100(a)..... 45
SUPERIOR COURTS MAY AT ANY TIME STAY EXECUTION, GRANT A NEW HEARING, OR SET ASIDE A PARENTAL RIGHTS TERMINATION JUDGMENT UPON A PARENT'S APPLICATION.

AS 47.10.100
AS 47.10.083 46
JURISDICTION OVER A CHILD IN NEED OF AID PROCEEDING DERIVES FROM CHILD'S STATUS AS A CHILD IN NEED OF AID, NOT CUSTODY.

AS 47.30.655(6)
AS 47.30.730(a)(3) 48
THE STATE MUST SHOW AN EXPECTATION OF IMPROVEMENT BY CLEAR AND CONVINCING EVIDENCE WHEN IT SEEKS INVOLUNTARY COMMITMENT ON A THEORY OF GRAVE DISABILITY.

DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 28, 2019 and March 1, 2020
according to laws enacted before the 2019 legislative session

Laws enacted in 2010

Ch. 83, SLA 2010, sec. 37 -- Emerging Energy Technology Fund

AS 42.45.375

Repealed January 1, 2020

Laws enacted in 2012

Ch. 25, SLA 2012, sec. 6 -- Health Care Professions Loan Repayment and Incentive Program

AS 18.29.010

Repealed June 30, 2019

AS 18.29.015

Repealed June 30, 2019

AS 18.29.020

Repealed June 30, 2019

AS 18.29.025

Repealed June 30, 2019

AS 18.29.030

Repealed June 30, 2019

AS 18.29.035

Repealed June 30, 2019

AS 18.29.099

Repealed June 30, 2019

Laws enacted in 2016

Ch. 25, SLA 2016, secs. 18 and 51, as amended by secs. 2 - 5 and 61, ch. 3, SLA 2017 -- Alaska Medical Assistance False Claim and Reporting Act

AS 09.10.075

Amended July 1, 2019

AS 09.58.015(b)

Amended July 1, 2019

AS 09.58.020

Repealed July 1, 2019

AS 09.58.025

Amended July 1, 2019

AS 09.58.030

Repealed July 1, 2019

AS 09.58.040

Repealed July 1, 2019

AS 09.58.050

Repealed July 1, 2019

AS 09.58.060

Repealed July 1, 2019

AS 09.58.070(b)

Amended July 1, 2019

AS 09.58.090(b)

Amended July 1, 2019

Laws enacted in 2017

Ch. 2, SSSLA 2017, secs. 35, 46, and 59 -- Opioids

AS 13.55.010

Enacted July 1, 2019

AS 13.55.020

Enacted July 1, 2019

AS 13.55.030

Enacted July 1, 2019

AS 13.55.040

Enacted July 1, 2019

AS 13.55.100

Enacted July 1, 2019

AS 13.55.110

Enacted July 1, 2019

AS 18.05.040(a)

Amended July 1, 2019

Ch. 1, 4SSLA 2017, secs. 44 and 80

AS 33.05.040(b)

Enacted July 1, 2019

Laws enacted in 2018

Ch. 10, SLA 2018, secs. 1 - 4, 7 -- Massage Therapists

AS 08.61.010	Amended July 1, 2019
AS 08.61.020	Amended July 1, 2019
AS 08.61.030	Amended July 1, 2019
AS 08.61.050	Amended July 1, 2019

Ch. 66, SLA 2018, sec. 2, 3 -- Pharmacists and Pharmacies

AS 08.80.030(b)(16), (c)	Enacted July 1, 2019
AS 08.80.157(k)	Enacted July 1, 2019
AS 08.80.159	Enacted July 1, 2019
AS 08.80.480(37), (38)	Enacted July 1, 2019

Ch. 100, SLA 2018, secs. 2, 4, 5, and 10 -- Pharmacy Benefit Managers

AS 08.80.297(c) and (d)	Enacted July 1, 2019
AS 08.80.460(b)	Amended July 1, 2019
AS 21.27.901	Enacted July 1, 2019
AS 21.27.905	Enacted July 1, 2019
AS 21.27.910	Enacted July 1, 2019
AS 21.27.915	Enacted July 1, 2019
AS 21.27.920	Enacted July 1, 2019
AS 21.27.925	Enacted July 1, 2019
AS 21.27.930	Enacted July 1, 2019
AS 21.27.935	Enacted July 1, 2019
AS 21.27.940	Enacted July 1, 2019
AS 21.27.945	Enacted July 1, 2019
AS 21.27.950	Enacted July 1, 2019
AS 21.27.955	Enacted July 1, 2019

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunset of advisory boards and task forces, and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES

ABSENT AGREEMENT BETWEEN THE PARTIES, A DEFENDANT MAY NOT MAKE EX PARTE CONTACT WITH A PLAINTIFF'S TREATING PHYSICIAN WITHOUT A COURT ORDER.

Defendants performed surgery and provided follow-up care for plaintiff's fractured clavicle. Plaintiff subsequently ended treatment with defendants, transferred care to another physician, and filed a medical malpractice suit against defendants. Defendants requested a medical release authorizing ex parte contact with plaintiff's treating physician. Plaintiff refused and sought a protective order prohibiting defendants from having ex parte contact with her treating physician. The superior court denied plaintiff's motion and granted defendant's motion, relying on the Alaska Supreme Court's decision in *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987).

The Alaska Supreme Court granted review to determine whether the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), which established medical privacy standards with specific exceptions, preempts or otherwise modifies Alaska personal injury case law allowing ex parte contact with a plaintiff's physician as an informal discovery method. The Court described the reasoning behind *Langdon* as encouraging the examination and settlement of cases while conserving judicial resources by finding that a plaintiff who files a personal injury action waives the physician-patient privilege as to all medical history relevant to the litigation and not imposing any legal impediment to informal discovery methods such as ex parte contact between a plaintiff's treating physician and defense counsel.

The Court concluded that while HIPAA does not preempt state case law in this area, *Langdon* should be overruled. The Court noted that HIPAA, enacted after the case was decided, created a new procedural framework for sharing medical information in litigation, and the current ex parte contact system was a poor discovery method in light of the new HIPAA procedures. The Court overruled *Langdon* and concluded that, absent agreement between the parties, medical discovery should be

conducted through the formal discovery rules rather than the informal discovery method of *ex parte* contacts between defense and plaintiff's treating physician.

Harrold-Jones v. Drury, 422 P.3d 568 (Alaska 2018), reh'g denied (Aug. 9, 2018).

Legislative review is not recommended.

A SECOND MOTION FOR RECONSIDERATION IS PERMISSIBLE WHEN THE SECOND REQUEST ADDRESSES NEWLY-ARISEN PROBLEMS.

A superior court granted a state motion for reconsideration, reversing its decision that two defendants had set forth a *prima facie* case of vindictive prosecution.

The court then ruled, *sua sponte*, that the defendants were entitled to subpoena the prosecutor to testify at an evidentiary hearing. The state filed a second motion for reconsideration, asking the superior court to reconsider its *sua sponte* decision. Instead of reaching the merits of the state's arguments, the superior court ruled the state was barred from filing this second request for reconsideration.

The Court of Appeals held that the superior court should have permitted the state's second motion for reconsideration regarding the court's decision to require the prosecutor to attend and testify at an evidentiary hearing. The Court of Appeals concluded that parties have the right to seek rehearing or reconsideration of a decision issued by a court on rehearing or reconsideration if the second request addresses problems that are newly arisen because of the court's decision on rehearing or reconsideration. The court based its decision on case law from other states and the policy of giving trial courts a full opportunity to consider and correct errors before appeal.

State v. Nicori, 407 P.3d 518 (Alaska App. 2017).

Legislative Review is not recommended.

Art. I, sec. 5,
Constitution of the
State of Alaska
AS 15.25.030(a)(16)

**DEMOCRATIC PARTY HAS AN ASSOCIATIONAL
RIGHT UNDER THE CONSTITUTION TO ALLOW
INDEPENDENT CANDIDATES IN ITS PRIMARIES.**

The Alaska Democratic Party amended its bylaws to allow registered independent voters to run as candidates in its primary elections without becoming Democratic Party members. The Division of Elections refused to allow independent voter candidates on the Democratic Party primary election ballot, positing that the "party affiliation rule" under AS 15.25.030(a)(16) prevented anyone not registered as a democrat from running in the Democratic Party's primary. The Democratic Party sued for declaratory and injunctive relief, and the superior court ruled in its favor. On appeal, the Alaska Supreme Court noted the unique facts of this case, specifically that the Democratic Party's bylaws allowed independent voters, in addition to Democratic voters, as candidates in primary elections. The Court concluded that the Democratic Party has an associational right under the Alaska Constitution "to choose its general election nominees, that this right is substantially burdened by the party affiliation rule, and that the State's asserted interests do not have a sufficiently close fit to justify the burden." The Court affirmed the superior court's decision to enjoin the party affiliation rule as unconstitutional.

State v. Alaska Democratic Party, 2018 WL 4041195 (Alaska Aug. 24, 2018).

Legislative review is recommended to review AS 15.25.030(a)(16) in light of this decision.

Art. I, sec. 9,
Constitution of the
State of Alaska
AS 11.41.210(a)(1)
AS 11.41.500(a)(3)

**WHEN THE STATE RELIES ON THE INFLICTION OF
SERIOUS PHYSICAL INJURY TO ELEVATE SECOND-
DEGREE ROBBERY TO FIRST-DEGREE ROBBERY,
ALASKA'S DOUBLE JEOPARDY CLAUSE PROHIBITS
SEPARATE CONVICTIONS FOR ASSAULT BASED ON
THE SAME INJURY.**

A jury found Smith guilty of first-degree robbery, first-degree burglary, second-degree assault, and second-degree theft in connection with a home invasion. At Smith's sentencing, the trial court merged the theft, but not the assault, into the robbery conviction. On appeal to the Alaska Supreme Court, Smith argued that Alaska's double jeopardy clause (art. I, sec. 9, Constitution of the State of Alaska) requires merging the robbery and the assault into a single conviction. The Court

held that separate convictions are warranted when first-degree robbery and assault are based on separate and distinct acts of force that occur as part of the same criminal episode. However, when the state relies on the infliction of serious physical injury to elevate second-degree robbery to first-degree robbery under AS 11.41.500(a)(3), the Court determined that Alaska's double jeopardy clause does not permit a separate conviction for assault based on the same injury. Because the first-degree robbery and second-degree assault convictions were not based on separate and distinct acts of physical force, the Court vacated Smith's separate assault conviction and directed the trial court to merge the second-degree assault verdict into the first-degree robbery conviction.

Smith v. State, 2018 WL 3597804 (Alaska App. July 27, 2018).

Legislative review is not recommended.

Art. XI, sec. 7,
Constitution of the
State of Alaska

AN INITIATIVE EFFECTS AN APPROPRIATION IF IT DOES NOT ALLOW THE LEGISLATURE ULTIMATE DECISION-MAKING AUTHORITY TO USE SPECIFIC PUBLIC ASSETS FOR SPECIFIC PURPOSES.

The Lieutenant Governor declined to certify a proposed ballot initiative to establish a permitting requirement for activities that could harm anadromous fish habitat, reasoning that the initiative effected an appropriation of state assets in violation of art. XI, sec. 7, Constitution of the State of Alaska. The initiative sponsors filed suit, and the superior court approved the initiative, concluding that the proposal would not impermissibly restrict legislative discretion. On appeal, the Alaska Supreme Court concluded the initiative would encroach on the discretion over allocation decisions delegated to the Department of Fish and Game by the legislature, and that the initiative as written effected an unconstitutional appropriation. The Court recognized the conflict between this decision and the Court's 2009 decision in *Pebble Ltd. Partnership v. Parnell*. However, the Court found that the appropriation analysis in *Pebble* was dictum and was neither binding nor persuasive. Specifically, the Court determined that its *Pebble* decision incorrectly: (1) applied precedent to characterize a complete prohibition on certain uses of public assets as a permissible initiative; (2) found that an initiative would not be an appropriation simply because it regulated

natural resources; (3) reasoned that the initiative would not be an appropriation because it did not allocate public assets to or from a user group; and (4) characterized legislative "discretion" as dependent on undefined terms. The Court stated that "[t]o follow *Pebble* to its logical conclusion would be to allow any initiative regulating public assets to go before the voters so long as it would not wholly usurp the legislature's allocation function. But that is not where the delegates intended to draw the line between permissible regulation and impermissible appropriation. Instead, an initiative must leave to the legislature ultimate decision-making authority to use specific public assets for specific purposes." The Court reversed the superior court and remanded for that court to direct the Lieutenant Governor to sever the offending provisions but place the remainder of the initiative on the ballot.

Mallott v. Stand for Salmon, 2018 WL 3751013 (Alaska Aug. 8, 2018).

Legislative review is not recommended.

Alaska Appellate Rule
404(f)

A PARTY MAY SEEK RECONSIDERATION OF AN APPELLATE COURT ORDER DENYING AN ORIGINAL APPLICATION THAT DENIES RELIEF BUT ISSUES A DECISION ON THE MERITS OF THE PARTY'S CLAIM.

Larson filed an original application for relief under Alaska Appellate Rule 404. The Alaska Court of Appeals denied the original application for relief in an order deciding the merits of Larson's claim; Larson then sought rehearing of that decision.

Appellate Rule 404(f) provides that "a petition for rehearing of the denial of an original application may not be filed." The appellate court noted that the rule "appears to prohibit a party from seeking reconsideration of *any* order denying an original application," but concluded that the rule applies only when the order does not address the merits of the petitioners claim, and does not apply when the appellate court denies relief, but issues a decision on the merits of a party's claim. In reaching its conclusion, the appellate court noted the application of Appellate Rule 403 regarding the procedure for petitions for review. Appellate Rule 403(g) provides that "a petition for rehearing of the denial of a petition for review may not be filed," but the rule has not been applied to prohibit a petition

for rehearing when the appellate court denies relief but technically "grants" the petition for review by reaching the merits of the claim. The Alaska Court of Appeals found that Appellate Rule 404(f) is analogous and should be similarly applied. The court also noted that when an appellate court order or opinion resolves the merits of a claim, "there appears to be no good reason to insulate the court's decision from rehearing simply because the case came to the court as a petition for review or as an original application for relief, rather than as an appeal." For these reasons, the court concluded that Appellate Rule 404(f) should be applied to allow a party to seek reconsideration of an appellate court order denying an original application when the court denies relief but resolves the merits of the party's claim.

Larson v. State, 407 P.3d 520 (Alaska App. 2017), reh'g denied (May 1, 2018).

Legislative review is not recommended, unless the legislature intends to prohibit a party from seeking reconsideration of all appellate court orders denying an original application.

Alaska Civil Rule
3(c)(1), Alaska Civil
Rule 12(b),
AS 22.10.040

THE PLAINTIFF BEARS THE BURDEN OF PROVING PROPER VENUE; FOR A BREACH OF CONTRACT CLAIM, VENUE IS PROPER IN A JUDICIAL DISTRICT WHERE A SUBSTANTIAL PART OF THE EVENTS GIVING RISE TO THE CLAIM OCCURRED.

A man alleged his employer promised him a ten-year term of employment, then terminated his employment two and a half years later. The man sued in the Second Judicial District, where he alleged the parties negotiated and formed their contract. The employer filed a motion to dismiss or to change venue to the Third Judicial District, where the contract was executed and where the man had performed most of his job duties. The superior court denied the motion, retaining venue in the Second Judicial District.

The Alaska Supreme Court first considered the procedures for applying Alaska Civil Rule 12(b), which allows objections based on improper venue to be asserted in a responsive pleading or by motion. Following the majority view of federal courts, the Court noted "it is the plaintiff's obligation in the first instance to file suit in a proper forum" and held the plaintiff bears the burden of proving proper venue. The Court also held that absent an evidentiary hearing, a court must

evaluate the pleadings in the light most favorable to the plaintiff. The Court next considered whether venue was proper in the Second Judicial District for the man's tort and contract claims. Under Alaska Civil Rule 3(c)(1), an "action may be commenced . . . in . . . the judicial district in which the claim arose." Considering precedent regarding venue for tort claims, the Court found that the Second Judicial District was not a proper venue because the man's tort claims did not arise in the district. The Court had not previously addressed where a contract claim arises for purposes of venue, and held that the American Law Institute Test, "which allows venue in any district in which 'a substantial part of the events or omissions giving rise to the claim occurred,' best serves the purposes of Alaska's venue doctrine." The Court determined that the Second Judicial District was not a place where a substantial part of the events or omissions giving rise to the breach of contract claim occurred and found venue improper in the Second Judicial District. The Court reversed the superior court's order denying a change of venue.

Brooks Range Petroleum Corp. v. Shearer, 425 P.3d 65 (Alaska 2018).

Legislative review is not recommended, unless the legislature wishes to amend venue requirements.

AS 40.25.120(a)(4)
Alaska Civil Rule
26(b)(3)
Alaska Rule of
Evidence 503(b)

ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES ARE EXCEPTIONS TO THE PUBLIC RECORDS ACT.

Griswold submitted public records requests to the City of Homer for communications between the Homer Board of Adjustment, city employees, and city attorneys leading up to the board's decision in a separate case involving Griswold, and attorney invoices. The city manager refused to provide records of communications about the Board's decision and completely withheld some invoices citing the attorney client and deliberative process privileges. On appeal, the Alaska Supreme Court held for the first time that the attorney-client and work-product privileges are state law exceptions to the Public Records Act. The Court instructed the superior court to follow the procedure set out in the Court's 1995 decision *In re Mendel* to determine whether attorney invoices are subject to the privileges. The Court advised that, consistent with all exceptions to the Public Records Act, the attorney-client and work-product privileges should be "construed narrowly to

further the legislature's goal of broad public access." The Court affirmed the superior court's ruling that communications related to the board's decision were protected by the deliberative process privilege.

Griswold v. Homer City Council, 2018 WL 4375455 (Alaska Sept. 14, 2018).

Legislative review is not recommended.

Alaska Criminal Rule
23(a)

CRIMINAL RULE 23 REQUIRES GOVERNMENT AND COURT APPROVAL OF A MISDEMEANOR DEFENDANT'S WAIVER OF JURY TRIAL.

Treptow appealed his conviction for felony driving under the influence (DUI). He argued that his prior DUI conviction in Arizona should not count as a prior conviction because unlike in Arizona, the Alaska Rules of Criminal Procedure grant a misdemeanor defendant an absolute right to demand a bench trial. Treptow claimed that under Alaska Criminal Rule 23(a), a felony defendant's waiver of jury trial requires government and court approval, but a misdemeanor defendant's waiver of jury trial does not require government or court approval.

Alaska Criminal Rule 23(a) states "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial. In felony cases, the waiver must be in writing with the approval of the court and the consent of the state. In misdemeanor cases, the waiver may be in writing or made on the record in open court."

The Alaska Court of Appeals noted that the third sentence of the rule does not expressly reiterate the "approval of the court" and "consent of the state," requirements. Although Treptow argued this means these elements are not required for misdemeanor cases, the court found the omission could mean the waiver need not be in writing, but could be oral. Based on the legislative history of Alaska Criminal Rule 23(a), the court concluded Treptow's argument misread Criminal Rule 23(a).

In the initial version of Alaska's criminal rules, issued in 1959, Criminal Rule 23(a) provided that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state." The 1959 Criminal Rules also contained a relaxed requirement for misdemeanor defendants, which stated the

waiver need not be in writing, instead allowing it to be made in open court. This misdemeanor rule eventually became District Court Criminal Rule 1. The District Court Criminal Rules were abolished in 2013 with the intent of incorporating the District Court Criminal Rules for misdemeanor offenses into the regular Criminal Rules. Criminal Rule 23(a) was then amended to its current form. The intent was not to change the law at all; an explanation of changes to the proposed change to Criminal Rule 23(a) states "[t]he changes in this rule clarify that felony waivers must still be in writing and that misdemeanor waivers may be in writing or made orally on the record as [currently] provided in [District Court Criminal Rule] 1(d)."

The court found that Criminal Rule 23(a) could be clearer, but the intent of the drafters to insert the provisions of District Court Criminal Rule 1(d) into Criminal Rule 23(a) without changing substantive law was clear. The court concluded that in felony and misdemeanor cases, Criminal Rule 23(a) requires the consent of the government and the approval of the court of a defendant's waiver of jury trial. The court therefore rejected Treptow's argument that the Arizona DUI should not count as a prior conviction.

Treptow v. State, 408 P.3d 1220 (Alaska App. 2017).

Legislative review is not recommended, unless the legislature would like to clarify the language of Criminal Rule 23(a).

Alaska Rule of
Evidence 505

MARITAL COMMUNICATIONS PRIVILEGE UNDER EVIDENCE RULE 505(B)(1) ONLY APPLIES TO CONFIDENTIAL COMMUNICATIONS.

The primary question at Arredondo's trial for driving under the influence was whether he or his wife, Jackie, had been driving. Jackie refused to testify, evoking her spousal immunity privilege under Alaska Rule of Evidence 505(a). The state called Jackie's mother to testify. Jackie's mother testified that the night of the incident, Jackie, who was then separated from Arredondo and staying with her mother, woke her mother and told her Arredondo had been in the house asking for help. Arredondo appealed, arguing his mother-in-law's testimony violated his marital communications privilege.

The Court of Appeals affirmed the trial judge's decision to overrule Arredondo's marital communications objection. The

court explained that Alaska Evidence Rule 505 has two distinct evidentiary privileges that apply to married couples. Rule 505(a), the "spousal immunity" privilege, which grants a spouse the right to refuse to take the stand at a legal proceeding involving their partner, belongs solely to the spouse called as a witness. Rule 505(b), the "marital communications" privilege, which grants a person the right to refuse to answer any questions about confidential communications had with their spouse during marriage, and the right to prevent their spouse from answering such questions, belongs to both the spouse called as a witness and the non-witness spouse. The court found that the marital communications privilege did not apply to prevent Arredondo's mother-in-law from testifying about her conversation with Jackie as it only applies to *confidential* communications between the spouses. The court noted that although Evidence Rule 505 does not define "confidential communication," the rule's commentary declares the phrase analogous to Evidence Rules 503(a)(5) and 504(a)(4), which both establish a communication as confidential only if the speaker does not intend for the statement to be disclosed outside the umbrella of privilege. The court found it reasonable to conclude Arredondo's request for Jackie's help was not intended to stay private between the two of them since the truck could not be removed without towing equipment. Therefore, Arredondo's seeking Jackie's help was essentially a delegation of authority in dealing with third parties. The court also noted that Arredondo's litigation strategy to assert the marital communications privilege as a means of excluding evidence that explained how Jackie knew Arredondo's vehicle was disabled on the highway waived the privilege because evidentiary privileges cannot be used to distort the fact-finding process.

Arredondo v. State, 411 P.3d 640 (Alaska App. 2018).

Legislative review is not recommended.

AS 08.45
12 AAC 42.990

**REGULATION CONSISTENT WITH STATUTE,
WHICH DOES NOT CONFER PRESCRIPTIVE
AUTHORITY ON NATUROPATHS.**

The Alaska Association of Naturopathic Physicians (association) challenged a new Department of Commerce, Community, and Economic Development (DCCED) regulation that effectively prohibited naturopaths from using and

prescribing injectable vitamins and minerals. Unlike the old regulation, the new regulation broadened the definition of "prescription drug" to encompass any prescription medicine, and explicitly excluded prescription drugs from the definitions of "dietetics," "herbal remedy," and "homeopathic remedy." The association argued the statutory definition of naturopathy includes dietetic use, such as injectable vitamins and minerals obtained by prescription, and that the statutory restrictions on naturopathy only prohibits the use of prescription *drugs*, not all prescription *medicines*.

The Alaska Supreme Court found that the new regulation, 12 AAC 42.990, is consistent with AS 08.45, the chapter that establishes a licensing structure for naturopaths. The statute does not define "prescription drug." The Court, therefore, considered the dictionary definition of "drug" and the overall structure and substance of AS 08.45, neither of which differentiated between prescription drugs and natural prescription medicines. The Court also looked to legislative intent and reasoned that because the only mention of naturopath prescribing authority is in the context of constraining it, the naturopath statutes as a whole do not support intent to allow naturopaths broad prescribing authority for non-prescription substances. The Court found that in statutes governing other healthcare providers, the legislature has explicitly defined those practices to include prescribing authority, which suggests that where the legislature intends to convey prescribing authority, it does so explicitly. The Court noted that this conclusion is supported by a 1985 Attorney General Opinion. Finally, the Court considered the legislative history of AS 08.45 and the legislature's consideration and omission of language alternatively granting naturopaths the authority to write prescriptions.

Alaska Ass'n of Naturopathic Physicians v. State Dep't of Commerce, 414 P.3d 630 (Alaska 2018).

Legislative review is recommended if the legislature intends to allow naturopaths to prescribe natural substances, including injectable vitamins and minerals.

AS 09.45.235

THE RIGHT TO FARM ACT DOES NOT SHIELD A PROPERTY OWNER FROM A NUISANCE LIABILITY CLAIM FOR A NUISANCE EXISTING ON THE PROPERTY BEFORE THE AGRICULTURAL FACILITIES OR OPERATIONS.

In 2005, Riddle acquired farmland and began engaging in farming activities. That same year, he constructed septage lagoons on his farmland, and began dumping septage collected by a business he owned. Riddle did not spread any septage on his farmland during the winter of 2009. In 2010, in addition to the septage from his business, he began accepting septage from Bigfoot Pumping and Thawing. Riddle began spreading septage on his farmland in June 2010. In 2007, Lanser purchased property adjacent to Riddle's property and reported first smelling odors from Riddle's farm in May 2010, after Riddle began accepting septage from Bigfoot Pumping and Thawing.

On appeal, the Alaska Supreme Court affirmed the superior court's findings that Riddle's septage storage created a private nuisance absent a successful Right to Farm Act defense, and the storage of septage was not protected by the Right to Farm Act. The Alaska Supreme Court noted that the Right to Farm Act is broad and had not previously been interpreted by the supreme court.

Alaska's Right to Farm Act provides that "[a]n agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations."

The Alaska Supreme Court held that Riddle was not shielded from nuisance liability by the Right to Farm Act because the Act does not immunize an existing, nonagricultural nuisance. Riddle did not use or intend to use the septage in any farming or agricultural capacity until after the septage lagoons were already a nuisance. The court further held that even if the farm was an agricultural facility before the septage lagoons became a nuisance, Riddle's earlier limited farming operations on the property do not shield him from nuisance liability. This is because the lagoons were not part of the agricultural facility at that time; they were not used or intended for use in farming at that time. Finally, the court held that Riddle's eventual use of the lagoon in farming did not constitute a "subsequent expansion of the agricultural facility."

Riddle v. Lanser, 421 P.3d 35 (Alaska 2018).

Legislative review is not recommended.

AS 09.55.570
AS 13.16.015
AS 13.16.245 - 13.16.440

**ONLY AN ESTATE'S PERSONAL REPRESENTATIVE
MAY APPEAR IN COURT ON BEHALF OF THE
ESTATE.**

A woman sued her former employer for unpaid compensation, naming the company and both its owners as defendants. One of the owners died while the suit was pending and the former employee substituted the owner's estate in the proceedings. Judgment was entered in favor of the employee. A year later, the deceased owner's widow moved for relief from judgment as the sole beneficiary of her husband's estate, arguing that neither her husband nor the estate had been properly served. The former employee responded that service was proper and the widow lacked authority to file a motion on behalf of the estate.

On appeal, the Alaska Supreme Court found that the Alaska probate code only grants the authority to appear in court on behalf of an estate to the estate's personal representative. The Court noted that AS 09.55.570 specifies that the personal representative is authorized to proceed in actions relating to the death of the person whose estate they represent. The Court reasoned that AS 09.55.570, combined with the grant of standing to sue and be sued under AS 13.16.350(c), confirms that the legislature specifically intended the personal representative to be the legal actor on behalf of an estate. The Court determined that the probate code's provisions concerning the appointment and removal of a personal representative also support this view. The Court concluded that Alaska probate law establishes a comprehensive scheme for the representation of an estate in legal matters that relies on the personal representative to act on the estate's behalf and does not allow others to exercise those powers. The Court affirmed the order of the superior court on the ground that the widow did not have the legal authority to move for relief from judgment on the estate's behalf.

Hester v. Landau, 420 P.3d 1285 (Alaska 2018).

Legislative review is not recommended unless the legislature wishes to allow a person who is not the personal representative of an estate to appear in court on the estate's behalf.

FOR PURPOSE OF AWARDING ATTORNEY'S FEES, FRIVOLOUSNESS IS EVALUATED BY CLAIM AND A CLAIM IS NOT FRIVOLOUS UNLESS THE LITIGANT ABUSES THE JUDICIAL PROCESS OR EXHIBITS IMPROPER OR ABUSIVE PURPOSE.

Manning filed a lawsuit in 2013 challenging moose and caribou subsistence hunt regulations. In 2015, while his lawsuit was pending in superior court, the Alaska Supreme Court issued a decision resolving similar claims. Manning moved to amend his complaint and add an individual officer as a defendant. The superior court denied both motions on grounds that the amendment would be futile because all his claims would fail under the 2015 decision. The court denied the state's motion for attorney fees, concluding Manning was exempt from an adverse attorney's fees award under the constitutional litigant exception.

The state appealed the superior court's denial of attorney's fees and argued the constitutional litigant exception did not apply because Manning's claims were frivolous. The Alaska Supreme Court explained that in this type of case, which is resolved without trial and without the prevailing party recovering a money judgment, the court is normally permitted to award the prevailing party 20 percent of its attorney's fees. However, the exception in AS 09.60.010 shields certain constitutional litigants. The statute requires that a non-prevailing litigant satisfy three conditions to qualify for the exception: (1) the litigant must have brought a civil action or appeal concerning the establishment, protection, or enforcement of a right under the state or federal constitution; (2) the action or appeal was not frivolous; and (3) the litigant lacked sufficient economic incentive to bring the action or appeal. The state argued Manning was ineligible because all his claims were frivolous. The Court held frivolousness should be evaluated on a claim-by-claim basis instead of holistically. The Court noted this is similar to the Court's analysis for whether a claim implicates a constitutional right, and also how the federal courts, in interpreting the federal analogue to the constitutional litigant exception, assess frivolousness. AS 09.60.010 does not define the term "frivolous," so to assess frivolousness, the Court looked to its interpretation under Alaska Civil Rule 11 sanctions, which are imposed on a party whose filings contain frivolous arguments. The Court stated that in most cases "a claim should not be considered frivolous unless the litigant has 'abused the judicial process' or 'exhibited an improper or abusive purpose.'" The Court concluded none

of Manning's claims in his original or amended complaint were frivolous and the constitutional litigant exception therefore shielded him from an adverse attorney's fees award. The Court reasoned the claims in his original complaint were filed before the Court's opinions rejecting similar claims. The Court interpreted claims in his amended complaint as either good-faith arguments for modifications to existing law that, although futile, were not frivolous, or as addressing recent state regulations that had never been considered.

Manning v. State, 420 P.3d 1270 (Alaska 2018).

Legislative review is not recommended.

AS 09.65.070(d)(2)

A MUNICIPALITY ENJOYS IMMUNITY ONLY FOR "PLANNING" DECISIONS.

A municipality maintained a campground during the winter to accommodate the local homeless population. A campground resident who was shot and severely injured sued the municipality. He argued that the municipality did not do enough to prevent the shooting and that the campground's caretaker performed his duties negligently, for which the municipality was vicariously liable. The municipality argued that it was immune from suit under AS 09.65.070(d)(2) for the actions taken through its employee because the municipality's decision to keep the campground open and to hire a particular caretaker were "discretionary" actions involving "deliberation" and "judgment."

The Alaska Supreme Court noted that some of the Court's past decisions on this topic did not clearly distinguish between the two different forms of discretionary function immunity enjoyed by a municipality and a municipal employee. The Court clarified that "a *municipality's* immunity under AS 09.65.070(d)(2) is different from, and narrower than, a *municipal employee's* immunity under the same statute and in the same circumstances." Specifically, while a municipality enjoys immunity only for "planning decisions" but not "operational decisions," a municipal employee enjoys personal or "official" immunity for any action involving "deliberation" and "judgment." The Court rejected the argument that the municipality was immune for its employee's actions under AS 09.65.070(d)(2) because the employee acted with "deliberation" and "judgment," and disavowed language in other cases that implies this conclusion. Instead, the Court held

that a government defendant is immune only if a claim challenges a "planning decision." In this case, the Court determined that the decision to allow limited drinking at the campground was a planning decision for which the city is immune. However, the city did not have the discretion to negligently carry out its decisions to open the campground and allow drinking. The Court concluded that the negligent supervision claim was "operational" rather than "planning" and remanded the case for further proceedings.

Lane v. City & Borough of Juneau, 421 P.3d 83 (Alaska 2018).

No legislative action is recommended, unless the legislature wishes for a municipality to enjoy immunity from suit for actions taken through its employee when the employee acted with "deliberation" and "judgment."

AS 11.41.110(a)(3)

SURVIVING ACCOMPLICES TO A FELONY MAY BE PROSECUTED FOR MANSLAUGHTER.

During the robbery of a marijuana grower, the grower mortally wounded two of Pfister's accomplices. Pfister was convicted of two counts of manslaughter for the deaths of his accomplices. Pfister challenged his manslaughter convictions, asserting that Alaska law bars an accomplice to a dangerous felony from conviction for manslaughter when the person killed is another accomplice. He claimed this is because AS 11.41.110(a)(3), which defines felony murder, expressly exempts situations where the person who dies is "one of the participants." Based on this exemption, Pfister argued the legislature must have intended to exempt accomplices to a felony from *any* criminal liability, including manslaughter, for the death of an accomplice.

The Alaska Court of Appeals found Pfister's argument inconsistent with the common-law definition of manslaughter and the history of Alaska's manslaughter statute. Under common law, the only intent required for felony-murder was the intent to commit an inherently dangerous felony, or any felony that was perpetrated in a dangerous manner. The felony-murder rule applied to deaths that were attributable to the commission of a felony, even unexpected or unforeseen deaths including the accidental killing of an accomplice. Common law defined manslaughter as any unlawful homicide that wasn't murder; if a person engaged in an unlawful act that resulted in an unintended death, and the death did not

constitute felony-murder, then the crime was manslaughter. The Court noted that until 1980, Alaska's felony-murder rule differed from the common law because it applied only to *intentional* killings committed during certain felonies. Since Alaska's felony-murder rule did not apply to unintended killings, those deaths fell into the residual category of manslaughter. The Court explained that the drafters of the criminal code then made significant changes. Alaska's felony-murder provision, AS 11.41.110(a)(3), now mirrors the common-law doctrine, in that an unintended homicide is second-degree murder if the homicide occurs during a specified serious felony. However, Alaska's felony-murder statute deviates from the common law in that a person cannot be convicted of felony-murder based on the death of an accomplice. The Court noted that this limitation is consistent with other modern criminal codes, but was not explained by the drafters of AS 11.41.110(a)(3). The drafters also modified the definition of manslaughter and defined negligent homicide as a separate crime from manslaughter.

The Court rejected Pfister's argument that because AS 11.41.110(a)(3) expressly exempts defendants in his position from second-degree murder, the legislature must have intended no lesser criminal liability, such as manslaughter, for the deaths of his accomplices. The court concluded that because manslaughter now requires proof of a culpable mental state (intentionally, knowingly, or recklessly), Alaska law allows a surviving accomplice to be prosecuted for manslaughter, or the lesser offense of criminally negligent homicide.

Pfister v. State, 2018 WL 2273046 (Alaska App. May, 2018).

Legislative Review is not recommended.

AS 11.41.220(a)(2)

REPEATED THREATS REQUIRE A CLEAR BREAK IN CONTEXT AND THE PASSAGE OF SUFFICIENT TIME BETWEEN DIFFERENT THREATENING STATEMENTS.

Saunders was charged with third-degree assault under AS 11.41.220(a)(2) for making repeated threats that he would inflict death or serious injury on his mother and his uncle. Some of these threats were made to his mother in person, and other threats were made in voice messages he left for his mother. The statements against his uncle were made in a single

message Saunders left on his mother's answering machine. On appeal, Saunders challenged the instruction the trial judge gave to the jury on the question of whether Saunders's threatening statements against his uncle should be considered "repeated" threats instead of one continuing threat.

The Court of Appeals noted that, as it had previously explained, a defendant commits third-degree assault under AS 11.41.220(a)(2) "if, acting with the intent to place another person in fear of death or serious physical injury, either to that person or to that person's family member, the defendant makes repeated threats to cause death or serious physical injury to another person." In *Konrad v. State*, 763 P.2d 1369 (Alaska App. 1988), the court interpreted the phrase "repeated threat" to mean "a threat made more than once." In *Konrad*, the court explained that when multiple threatening statements are uttered in a single conversation or communication, the jury must treat the statements as a single threat unless the state shows the statements were discrete threats. The court noted how its discussion in *Konrad* could have been worded more clearly to clarify that the case sets forth the *elements* of what it means for a person to utter "repeated" threats during a single conversation, not just *factors* to be considered by the trier of fact. The court reiterated that, as stated in *Konrad*, "the ultimate question is whether the defendant's repeated threatening statements amounted to separate acts, or whether those repeated statements were simply part of a single continuous threat." The court clarified *Konrad* by stating that "[t]o answer that question, the fact-finder must decide whether the evidence establishes 'a clear break in context' between the different threatening statements and 'the passage of sufficient time' between the threatening statements 'to permit reflection.'" What constitutes "a clear break in context" and "the passage of sufficient time to permit reflection" is left to the fact-finder to decide based on the totality of the evidence.

The court agreed with Saunders that the judge incorrectly stated the law, but concluded that, in this case, the error was harmless beyond a reasonable doubt and upheld Saunders's conviction.

Saunders v. State, 413 P.3d 1241 (Alaska App. 2018).

Legislative review is not recommended.

AS 11.46.310(a)
AS 11.81.900(b)(5)
AS 11.56.800(a)(2)

BICYCLE STORAGE SHED IS A "BUILDING" UNDER BURGLARY STATUTES; MAKING A FALSE REPORT REQUIRES OBJECTIVELY CREATING A REASONABLE LIKELIHOOD POLICE WILL ACT.

Coleman was convicted of second-degree burglary and making a false report for breaking into a commercial bike shop's storage shed and stealing two bicycles. On appeal, Coleman challenged his burglary conviction, arguing the shed was too small to be a "building" under the burglary statutes. He challenged his conviction for making a false report, arguing that his statement to police did not qualify as a false report of a crime.

Under AS 11.46.310(a) a person commits burglary if the person "enters or remains unlawfully in a building with intent to commit a crime in the building." AS 11.81.900(b)(5) defines "building," in part, as "in addition to its usual meaning, includ[ing] any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business[.]" Coleman argued the shed did not qualify as a "building" because burglary was originally intended to protect dwellings, and the shed was not designed for human habitation or large enough to comfortably accommodate people. Finding the statutes ambiguous on how large a structure must be to be a "building," the Court of Appeals looked to legislative history and the Oregon law on which AS 11.81.900(b)(5) is based, finding that both the Alaska and Oregon legislatures intended "building" to be expansive. The court held that while a structure too small for humans to physically enter and occupy does not qualify as a "building," a bicycle shed large enough for humans to fully enter does.

In relevant part, AS 11.56.800(a)(2) provides that "[a] person commits the crime of false . . . report if the person knowingly . . . makes a false report to a peace officer that a crime has occurred or is about to occur." Coleman was charged with making a false report for telling police he was in the area of the bicycle shop chasing his stolen van. Based on the officer's suspicions that Coleman was responsible for the burglary, he was arrested and the van keys were found in his pocket. Coleman argued that "report" requires "a formal disclosure with the concomitant expectation that the police will take action on the information" and that his false statement was not believed or acted on by police. The court reviewed the limited legislative history and found that the plain language of AS 11.56.800(a) distinguishes between giving "false

information" and making "a false report." The court held that the crime of making a false report requires the state to prove that the person knowingly made a false statement to police that "a crime had occurred or was about to occur" under "circumstances that objectively created a reasonable likelihood" that police would expend law enforcement resources acting on the false claim. The court concluded there was insufficient evidence to convict Coleman of making a false report.

Coleman v. State, 407 P.3d 502 (Alaska App. 2017).

Legislative review is not recommended unless the legislature intends a different meaning of "building."

AS 11.56.757
AS 12.55.027(d)

A DEFENDANT WHO VIOLATED CONDITIONS OF BAIL RELEASE IN A NON-CRIMINAL WAY BETWEEN JULY 12, 2016, AND NOVEMBER 27, 2017, MAY RECEIVE CREDIT FOR ELECTRONIC MONITORING.

Thompson was arrested on various charges and released on pre-trial bail with conditions of electronic monitoring and a prohibition on the use of alcohol and controlled substances. Under AS 12.55.027(d), a person who "has not committed a criminal offense while under electronic monitoring" may receive credit against a sentence of imprisonment for time spent on electronic monitoring. Before July 12, 2016, AS 11.56.757 clearly stated that it was a crime to violate the conditions of one's bail release. Effective July 12, 2016, AS 11.56.757 was amended to provide that a person who violated a condition of their bail release was guilty only of "a violation punishable by a fine of up to \$1,000." Effective November 27, 2017, AS 11.56.757 was again amended to make violating one's conditions of bail release a crime. On July 27, 2016, Thompson was remanded to custody after his arrest for fourth-degree assault, fourth-degree criminal mischief, and using alcohol in violation of a bail condition. On October 19, 2016, Thompson was again remanded after testing positive for drugs. At sentencing, Thompson requested credit against his sentence for his time spent on electronic monitoring. The state argued that Thompson was not eligible for any credit because he violated the conditions of his release both times he was on electronic monitoring. Thompson responded that under AS 11.56.757, as amended effective July 2016, his violations of the conditions of his release did not

qualify as "criminal offenses" for purposes of AS 12.55.027(d). The superior court agreed that Thompson's violations of his release conditions were no longer criminal offenses under Alaska law and granted him the credit.

On appeal, the Court of Appeals determined that the plain language of AS 11.56.757, as it read from July 12, 2016, to November 27, 2017, clearly provided that defendants who violated conditions of bail release in a non-criminal way did not "commit a criminal offense" for purposes of AS 12.55.027(d). The court did not find any legislative history to overcome the plain language of AS 12.55.027(d), which prohibits credit if a person commits a criminal offense and does not address defendants who otherwise violate a condition of bail release. Thus, the court held that Thompson's drug and alcohol violations of his bail conditions did not disqualify him from receiving credit for the days he spent on electronic monitoring. The court remanded the case to the superior court regarding whether Thompson committed fourth-degree assault and fourth-degree criminal mischief during his first period of electronic monitoring release.

State v. Thompson, 425 P.3d 166 (Alaska App. 2018).

Legislative review is not recommended.

AS 11.56.760
AS 44.41.035

DNA SAMPLE REQUIREMENT IS NOT AN EX POST FACTO LAW.

Prior to his release, an inmate refused to provide a DNA sample to a parole officer for Alaska's DNA identification registration system, in violation of AS 11.56.760 and 22 AAC 05.400(c)(24). The inmate was found guilty of an infraction in a prison disciplinary hearing for his refusal. On appeal, he argued that the crimes he was convicted of and incarcerated for occurred before the DNA identification registration system statute took effect and so it did not apply to him. He argued that the DNA sample requirement is not retrospective, and if it is, it violates the ex post facto clauses of the state and federal constitutions.

In 1995, AS 44.41.035 created the DNA identification registration system, effective January 1, 1996, which applied "to all convictions occurring on or after [January 1, 1996] for a crime against a person." The inmate was not required to provide a sample under the 1995 Act since he was convicted

before January 1, 1996. But in 2003, the legislature expanded the list of crimes requiring DNA submission. The 2003 changes applied to all convictions after July 1, 2003, and all convictions before that date if the person was incarcerated or under probation or parole on or after that date. Because the inmate's crimes were eligible felonies and he was incarcerated in 2003, the Alaska Supreme Court found he was required to provide a DNA sample.

The Court reviewed art. I, sec. 15, Constitution of the State of Alaska, and opinions of courts in other jurisdictions and held that the DNA sample requirement is not an ex post facto law. As used in the Court's 2008 case, *Doe v. State*, a two-part test determines whether a statute imposes punishment and violates the ex post facto clause of the Alaska Constitution. The Court reviewed the legislature's minutes from the creation of the DNA registry and concluded the legislature's intent was not penal. The Court then considered the effects of the DNA sample requirement with respect to seven factors set forth in *Doe*: (1) whether the sanction involves affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation promotes the traditional aims of punishment; (5) whether the behavior to which it applies is already a crime; (6) whether it has a legitimate, regulatory purpose; and (7) whether it appears excessive in relation to its purpose. Considering these factors, the court concluded the DNA sample requirement under AS 44.41.035 is not punitive and does not violate state and federal ex post facto clauses.

Simmons v. State Dep't. of Corr., 2018 WL 4374714 (Alaska Sept. 14, 2018).

Legislative review is not recommended.

AS 12.55.027(d)

A DEFENDANT'S COMMISSION OF A NEW CRIME WHILE ON ELECTRONIC MONITORING REMOVES A TRIAL COURT'S ABILITY TO GRANT CREDIT AGAINST A SENTENCE OF IMPRISONMENT.

Bell was convicted of second- and third-degree theft. He was granted bail pending appeal and spent three distinct periods on electronic monitoring. The first period ended based on allegations he violated conditions of his release, the second period was interrupted by a voluntary remand and ended when

Bell was arrested and charged with third-degree theft, a new criminal offense to which he pleaded guilty. The third period continued from his date of release through the end of his appeal. Bell asked the superior court to award him credit against his sentence of imprisonment for the time he spent on electronic monitoring pending appeal. The superior court credited Bell for the entire time spent on electronic monitoring, with the exception of the day he committed the third-degree theft.

On appeal, the Alaska Court of Appeals concluded Bell was entitled to credit for the third period of his bail release under AS 12.55.027(d). This statute authorizes trial courts to award credit against a defendant's sentence for time spent on bail release if the conditions of release include electronic monitoring and are otherwise sufficiently restrictive. However, the court concluded Bell was not entitled to credit for the second period because AS 12.55.027(d) prohibits credit if the defendant commits a new criminal offense while on electronic monitoring. Here, Bell's arrest for third-degree theft ended the second period. The court rejected Bell's argument that AS 12.55.027 does not require a complete forfeiture of credit. The court reasoned that Bell's interpretation was at odds with the statutory language and legislative intent of AS 12.55.027(d). The court noted that the sponsor of the legislation unequivocally stated that a person that commits another crime while on electronic monitoring does not get credit, and that earlier legislative comments suggesting judicial interpretation would be necessary were later resolved.

Bell also argued that his commission of a new criminal offense should not bar him from credit for the part of the second period before his voluntary interruption. The state argued that voluntary interruption does not start anew a defendant's eligibility for credit under AS 12.55.027(d). Otherwise, defendants could "bank" credit by periodically remanding themselves. Because such manipulation would be contrary to legislative purpose, the court adopted the state's proposed rule for determination of when a defendant's "time on electronic monitoring" under AS 12.55.027(d) begins and ends. The court found that since Bell's time on electronic monitoring during the second period was governed by the same court order, Bell's commission of a new crime at the end of that period bars him from receiving any credit for the entirety of that period.

State v. Bell, 421 P.3d 128 (Alaska App. 2018).

Legislative review is recommended to determine whether the court's interpretation of AS 12.55.027(d) is consistent with the legislature's intent.

AS 12.55.027(d)

A POST-JUDGMENT MOTION FOR SENTENCING CREDIT IS A CRITICAL STAGE OF A CRIMINAL PROCEEDING FOR WHICH A DEFENDANT IS ENTITLED TO COUNSEL.

Belknap was convicted of felony driving under the influence and sentenced to three years to serve. After sentencing, Belknap filed a pro se motion under AS 12.55.027(d) requesting sentencing credit for the time he spent on bail release under conditions that included electronic monitoring and requested appointed counsel to assist him. The court denied Belknap's request for counsel and granted his request for 62 days of sentencing credit out of 279 days he sought. On appeal, Belknap argued that the superior court erred in denying the additional sentencing credit and his request for appointment of counsel.

The Court of Appeals found that a post-judgment motion for sentencing credit is a critical stage of a criminal proceeding for which a defendant is entitled to assistance of counsel. The court concluded that Belknap was entitled to re-litigate his request for the additional sentencing credit with the assistance of counsel. The court expressed no opinion as to whether Belknap was entitled to the additional sentencing credit.

Belknap v. State, 2018 WL 3597570 (Alaska App. July 27, 2018).

Legislative review is not recommended.

AS 12.55.125(o)

FORMER SENTENCING PROVISION REQUIRES PROBATION FOR A MANDATED PERIOD FOR A SEXUAL FELONY CONVICTION EVEN WITHOUT IMPOSITION OF A SUSPENDED SENTENCE.

The legislature amended AS 12.55.125 in 2006 to add subsection (o), creating a special sentencing rule for most defendants convicted of sexual felonies, except those subject to a mandatory 99 years' imprisonment. Subsection (o) required the superior court to suspend a specified amount of the defendant's sentence and place the defendant on probation

for a specified number of years after the defendant finished serving their active term of imprisonment. The special terms of probation in AS 12.55.125(o) could not be suspended or reduced. All five defendants in a consolidated appeal were convicted of sexual felonies, sentenced according to subsection (o), and later violated the conditions of their probation. At their probation revocation hearings, the defendants asked the superior court to impose all of their remaining suspended jail time and terminate their probation. None of the defendants had spent the minimum number of years on probation specified in subsection (o). The superior court imposed the remaining jail time in each case, but refused to reject further probation because of subsection (o). In the summer of 2016, the legislature repealed AS 12.55.125(o), and the defendants jointly filed a motion to dismiss their appeals as moot.

The Court of Appeals rejected this argument and concluded the state was correct that the special probation requirement of subsection (o) governed the defendants' sentences despite its repeal because the repealing language did not state the repeal was retroactive. The court based its decision on AS 01.10.100(a) and guidance from a United States Supreme Court decision. The court concluded that defendants sentenced under now-repealed AS 12.55.125(o) are not entitled to reject the special term of probation required by that statute. The defendants conceded that the purpose of AS 12.55.125(o) was to require all felony sex offenders to undergo a mandatory period of supervision following release from custody, but argued the legislature did not intend to alter the normal rule that probation must be accompanied by a suspended term of imprisonment. The court found that the legislative history of AS 12.55.125(o) demonstrated the legislature intended a mandatory rather than contractual period of non-custodial supervision with no relationship to whether a portion of the defendant's sentence is suspended. The court noted that the legislature enacted AS 11.56.759 in 2007 to ensure that the conditions of this mandatory probation remained enforceable even if there were no longer any suspended sentence the court could impose. The court therefore upheld the superior court's ruling that the defendants must serve the periods of probation mandated by AS 12.55.125(o).

Chinuhuk v. State, 413 P.3d 1215 (Alaska App. 2018).

Legislative review is not recommended.

AS 12.55.135(a)
AS 28.35.400

THE PRESUMPTIVE 30-DAY SENTENCING CEILING ESTABLISHED UNDER AS 12.55.135(a) APPLIES TO RECKLESS DRIVING UNDER STATE LAW AND ANCHORAGE MUNICIPAL LAW.

Beezley was convicted of the Anchorage municipal offense of reckless driving, which provides that a convicted individual may be imprisoned for up to one year. This penalty was established when the maximum penalty provided for class A misdemeanors under state law was also one year's imprisonment. However, in 2016, the legislature amended AS 12.55.135(a) to create a presumptive sentencing ceiling of 30 days' imprisonment for most class A misdemeanors, which may only be exceeded if the State proves one of the factors listed in AS 12.55.135(a)(1). The district court ruled that even though the municipal offense of reckless driving is not a "class A misdemeanor," the presumptive 30-day sentencing ceiling under AS 12.55.135(a) governs Beezley's sentencing.

On appeal, the Court of Appeals noted that under AS 28.01.010(a) and 29.25.070(g), a municipality may not enact penalty provisions for traffic offenses that exceed the penalties for corresponding state traffic offenses, unless otherwise directed by the legislature. The court found that if the presumptive 30-day sentencing ceiling under AS 12.55.135(a) applies to the state offense of reckless driving, then the ceiling also applies to the municipal offense of reckless driving. The court observed that the legislature, in establishing the 30-day presumptive ceiling under AS 12.55.135(a), failed to consider non-classified misdemeanors under other titles of the Alaska statutes. The court noted that driving under the influence (a class A misdemeanor under AS 28.35.030(a)) is subject to the presumptive 30-day sentencing ceiling under AS 12.55.135(a) and is a greater offense than reckless driving. The court concluded that the legislature could not have intended to create the sentencing discrepancy that would exist if the 30-day presumptive sentencing ceiling applied to driving under the influence but not reckless driving. The court therefore held that the presumptive 30-day sentencing ceiling under AS 12.55.135(a) applies to sentencing for reckless driving under AS 28.35.400(a) and Anchorage municipal law.

Municipality of Anchorage v. Beezley, 2018 WL 3947108 (Alaska App. Aug. 17, 2018).

Legislative review is not recommended unless the legislature

wishes to clarify which non-classified misdemeanors codified in titles of the Alaska statutes other than Title 11 fall under the presumptive 30-day sentencing ceiling in AS 12.55.135(a).

AS 12.55.145(a)(1)(B) **A FELONY DUI CONVICTION FROM MONTANA IS A "PRIOR FELONY CONVICTION" FOR PURPOSES OF AS 12.55.145(a)(1)(B).**

Brown pleaded guilty to a felony in Alaska. At Brown's sentencing, the parties disagreed as to whether Brown's prior felony DUI conviction from Montana should count as a "prior felony conviction" under AS 12.55.145(a)(1)(B). The superior court ruled that it should and sentenced Brown as a second felony offender. On appeal, the Court of Appeals considered whether the definition of "prior felony conviction" under AS 12.55.145(a)(1)(B) excludes felony DUI convictions from states like Montana where the question of whether a defendant has prior convictions is litigated to the sentencing judge rather than the jury. The court determined that "even though a defendant's prior convictions are an element of felony DUI (in the strict sense) under Alaska law, there appears to be very little practical difference" in the way felony DUI charges are normally litigated in Alaska and in Montana and states with DUI laws similar to Montana. The court noted that since a defendant's prior convictions are normally not litigated to a jury in Alaska, the legislature likely did not intend AS 12.55.145(a)(1)(B) to exclude felony DUI convictions from states like Montana. For these reasons, the court held that a felony DUI conviction from Montana is a "prior felony conviction" for purposes of AS 12.55.145(a)(1)(B).

Brown v. State, 425 P.3d 216 (Alaska App. 2018).

Legislative review is not recommended unless the legislature wants to amend AS 12.55.145(a)(1)(B) to provide that a "prior felony conviction" does not include felony DUI convictions from states where the defendant has no right to a jury trial on the question of prior convictions.

AS 12.55.155(c)(18)(A)

THE STATUTORY AGGRAVATING FACTOR FOR FELONIES INVOLVING DOMESTIC VIOLENCE DOES NOT APPLY IF THE VICTIM'S IDENTITY AND RELATIONSHIP TO THE DEFENDANT HAS NO BEARING ON THE DEFENDANT'S BLAMEWORTHINESS OR DEGREE OF DANGEROUSNESS.

Tofelogo lived in a treatment group home and shared a room with the victim, Fathke. While both Tofelogo and Fathke were in their room, Tofelogo pretended to be a ninja, executed a martial arts move with a long-bladed knife, and accidentally inflicted Fathke with a fatal wound. Tofelogo later pled guilty to criminally negligent homicide. Under AS 12.55.155(c)(18)(A), a felony offense is aggravated for sentencing purposes if the offense is one of the "offenses against the person" defined in AS 11.41 and was "committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant." At sentencing, the superior court judge gave some weight to aggravator (c)(18)(A) because Tofelogo and Fathke were roommates. On appeal, Tofelogo argued the facts of his case did not fit within the legislature's rationale for enacting aggravator (c)(18)(A) and the sentencing judge therefore should not have given this aggravator any weight.

The Court of Appeals found that "the underlying rationale of aggravator (c)(18)(A) is to authorize courts to impose more severe sentences on defendants whose relationship to their victim makes the crime more blameworthy" and that, as pointed out in prior cases, the literal wording of aggravator (c)(18)(A) exceeds this underlying rationale. The court reasoned that the rationale of aggravator (c)(18)(A) does not apply in cases where "the identity of the victim and the victim's relationship to the defendant have essentially no bearing on the blameworthiness of the defendant's conduct or the defendant's degree of dangerousness." The court held that though Tofelogo's case fell within the literal wording of aggravator (c)(18)(A), the rationale of the aggravator did not apply to the facts of the case, and the sentencing judge should not have given the aggravator any weight.

Tofelogo v. State, 408 P.3d 1215 (Alaska App. 2017).

Legislative review is not recommended.

AS 12.63.100(6)(C)

REGISTRATION AS A SEX OFFENDER IN ALASKA IS ONLY REQUIRED FOR THOSE OUT-OF-STATE CONVICTIONS WITH ELEMENTS THAT ARE CATEGORICALLY ALIKE WITH NO SIGNIFICANT DIFFERENCES TO THE ELEMENTS OF AN ALASKA STATUTE.

The Department of Public Safety (DPS) required two individuals to register as sex offenders in Alaska based on their out-of-state convictions. Under the Alaska Sex Offender Registration Act (ASORA), an individual must register in Alaska as a sex offender if the individual was convicted of "a crime, or an attempt, solicitation, or conspiracy to commit a crime, under [one of the listed statutes] or a similar law of another jurisdiction." DPS argued the convictions, in Washington and California, were "similar" to the Alaska offense of attempted sexual abuse of a minor. A superior court ruled the individual convicted in Washington was not required to register; another superior court ruled the individual convicted in California was required to register. The cases were consolidated on appeal. The Alaska Supreme Court determined that the plain meaning of AS 12.63.100(6)(C) requires that the elements of the statute of conviction must be similar to the elements of an Alaska statute. Because ASORA does not define "similar," the Court looked to the plain meaning of the term, how other states define the standard of comparative resemblance between their home statutes and those of other jurisdictions, the legislative history and purpose of ASORA, and dictionary definitions. The Court found that the phrase "a similar law of another jurisdiction" means that the elements of an out-of-state statute of conviction must be categorically alike with no significant differences to the elements of the Alaska statute. The Court held that neither the Washington nor California laws were similar to the relevant Alaska law and therefore held that neither individual was required to register under Alaska law.

State, Dep't of Pub. Safety v. Doe, 425 P.3d 115 (Alaska 2018).

Legislative review is recommended if the legislature wants to require out-of-state sex offenders to register in Alaska for any offense for which they were required to register as a sex offender in the state of conviction or permit the court to consider the factual conduct giving rise to the out-of-state sex offense conviction.

AS 13.12.114
AS 13.12.403
AS 25.20.050

PATERNITY DETERMINATIONS IN PROBATE PROCEEDINGS DO NOT REQUIRE A SEPARATE CAUSE OF ACTION.

A man asserted in a probate proceeding that he was the decedent's son and requested a paternity determination. The estate's personal representative opposed the request, arguing that a paternity determination could not be made in a probate proceeding and that the paternity determination was barred by the statute of limitations. The superior court ruled that probate proceedings were not appropriate for paternity determinations and rejected the man's request but did not reach the statute of limitations issue. On appeal in *Estate of James V. Seward*, 401 P.3d 976 (Alaska 2017), the Alaska Supreme Court held that paternity determinations can be made in probate proceedings and noted it would order supplemental briefing on the statute of limitations issue.

After ordering the supplemental briefing, the Court held that a paternity determination in a probate proceeding is not a separate cause of action subject to a statute of limitations. The exempt property allowance statute, AS 13.12.403, provides that when a decedent has no surviving spouse, the decedent's children are entitled from the estate to a value not exceeding \$10,000 in excess of security interests in the items of the estate. The Court then looked to the probate code mechanism for establishing the parent-child relationship for purposes of intestate succession, with "child" defined generally under AS 13.12.114, which states that the parent-child relationship may be established as indicated under AS 25.20.050 (legitimation by subsequent marriage, acknowledgment in writing, or adjudication). The court held that the plain language of AS 13.12.114 creates a procedure for establishing paternity and does not establish a separate cause of action. The court found that the language of AS 13.12.114 and AS 25.20.050, incorporated by reference, are best read as defining the process a court must follow to determine heirs, not as providing a cause of action. Having decided that the man need not bring a separate paternity suit, the Court held that he timely asserted his right to the exempt property allowance. The Court had previously held that family allowances in the probate code are not "claims" within the meaning of AS 13.06.050. The court held that the man's claim was not time-barred because assertions of right to the exempt property allowance are not "claims against a decedent's estate" within the meaning of AS 13.16.460(b), the man asserted his right while the estate was still open, and that even if a two-year

limitation period were applied, it would accrue from the date of the decedent's death and the man asserted his rights that same year. The Court therefore reversed the superior court's ruling that the man could not seek a paternity determination in a probate proceeding and remanded for a paternity determination in conformity with AS 13.12.114.

Matter of Estate of Seward, 424 P.3d 333 (Alaska 2018).

Legislative review is not recommended.

AS 15.13.145(a)(4)

UNDER AS 15.13.145, EVIDENCE OF ACTUAL INFLUENCE FROM INAPPROPRIATE USE OF PUBLIC MONEY IS NOT REQUIRED, AND APOC INTERPRETATION OF "MONEY" TO INCLUDE PROPERTY AND ASSETS IS REASONABLE.

A complaint against then-city council member John Eberhart claimed he improperly used government resources (his city email address) in his mayoral campaign. After an investigation and hearing, the Alaska Public Offices Commission (APOC) fined Eberhart \$37.50 for improper use of government resources in violation of AS 15.13.145(a)(4), which the superior court affirmed.

On appeal, the Alaska Supreme Court rejected Eberhart's arguments related to the interpretation of AS 15.13.145. AS 15.13.145 prohibits the use of "money held by" public entities, including municipalities and officers or employees of such entities "to influence the outcome of the election of a candidate to a state or municipal officer." Eberhart argued that the statute, by its plain text, only punishes acts that actually influenced an election. The Court held APOC's interpretation, that "to influence" means "for the purpose of influencing," is both reasonable and in keeping with the general rule that courts not read additional terms into a statute. Additionally, the Court reasoned it would be illogical to require proof of actual influence when that level of proof is not required to overturn the result of a completed election. The Court also held that it was reasonable for APOC to interpret "money" to include property and assets such as the city's email system, as APOC had done in prior decisions. The Court found APOC's interpretation was the most reasonable interpretation of the term "money" given the definition of the term in 2 AAC 50.356(d). The Court also found APOC did not violate the First Amendment by enforcing a statute without first

finding Eberhart engaged in corruption.

Eberhart v. Alaska Pub. Offices Comm'n, 2018 WL 4041135 (Alaska Aug. 24, 2018).

Legislative review is not recommended.

AS 18.23.030

MEDICAL PEER REVIEW PRIVILEGE STATUTE DOES NOT EXTEND TO PERSONAL KNOWLEDGE AND OUTSIDE OBSERVATIONS OR MATERIALS.

A hospital invoked the Alaska medical peer review privilege statute, AS 18.23.030, in two separate actions, a wrongful death suit and a medical malpractice claim, against the same physician, and a negligent credentialing claim. In a consolidated appeal, the Alaska Supreme Court reversed the discovery orders of the superior court, concluding that the orders compelled the hospital to disclose information protected by the privilege.

AS 18.23.030 restricts the discovery of information and data acquired by medical peer review organizations, and the proceedings and records of those organizations. The privilege is subject to exceptions including, under subsection (a), materials otherwise available or information within an individual's personal knowledge, and, under subsection (b), materials provided to a peer review organization that are alleged to contain false information. The Court looked to the plain text, legislative history, and purpose of the statute, and reviewed similar statutes in other jurisdictions. The court held that, under subsection (a), a piece of evidence must satisfy three conditions for the privilege to apply: (1) the peer review committee must be a "review organization," (2) the evidence must be either data and information acquired by a review organization in the exercise of its duties and functions or what transpired at a review organization meeting if sought in a civil action against a healthcare provider arising out of the matter that was under the organization's consideration, and (3) the evidence must not otherwise be available from original sources or within an individual's personal knowledge. The Court found that AS 18.23.030(a) supports a broad construction of the privilege and protects complaint-related materials contained in peer review committee files, even if those materials were generated outside the peer review process and not generated by the committee. The Court ruled that the limitation permits a litigant to obtain the original information or personal

knowledge only from outside sources. The Court also held that the false information exception in AS 18.23.030(b) applies to plaintiffs bringing claims for which the submission of false information is an element.

Mat-Su Valley Medical Center, LLC v. Bolinder, 2018 WL 4374851 (Alaska Sept. 14, 2018).

Legislative review is not recommended.

AS 18.66.100

A NEW DOMESTIC VIOLENCE PROTECTIVE ORDER REQUIRES THE SHOWING OF A NEW INCIDENT OF DOMESTIC VIOLENCE.

The relationship between Sarah and Sean Whalen resulted in Sarah requesting a number of domestic violence protective orders against Sean, some of which were granted. In September 2015, Sarah filed a request to modify a September 2014 protective order. Under AS 18.66.100(b)(2), most provisions of long-term protective orders only last one year. After the superior court denied the motion, explaining that Sarah could not get an extension but would have to file a petition for a new long-term protective order, she filed a petition for an ex parte and long-term domestic violence protective order against Sean. The superior court ruled that Sarah could not receive the order by relying on Sean's past history of domestic violence, but had to show a new incident of domestic violence. The court found there had not been a new incident and denied Sarah's petition.

Sarah appealed, claiming she should be able to rely on past protective orders to obtain a new protective order. She argued that protective orders are a form of injunctive relief that address an abatable condition and therefore res judicata does not apply. Res judicata prevents a party from suing on a claim which has previously been litigated to a final judgment by that party. The Alaska Supreme Court held that res judicata barred her most recent action because Sarah had not alleged a new statutory invasion or injury in the form of a new domestic violence incident. Rather, her complaint stemmed from previous incidents which had already been litigated and resulted in the September 2014 protective order.

The court reviewed AS 18.66.100 and found the statute does not allow for the issuance of additional protective orders in the absence of a new incident of domestic violence. Instead, the statute "unambiguously provides for the duration of the various

kinds of protective relief that can be ordered." AS 18.66.100(c)(1) has an indefinite time limitation, and the other subsections expressly limit the duration to "one year unless earlier dissolved by the court." In its review of the legislative history, the court found that the legislature chose those specific time limits while replacing a statute that permitted an extension and that if the legislature intended to allow for multiple protective orders from the same incident of domestic violence, it was not provided for in statute.

Whalen v. Whalen, 2018 WL 3800115 (Alaska Aug. 10, 2018).

Legislative review is recommended if the legislature intends to allow for renewal of protective orders.

AS 18.66.120

A COURT MAY NOT CHANGE OR ELIMINATE THE FACTUAL FINDINGS ON WHICH A FINAL AND UNAPPEALED LONG-TERM PROTECTIVE ORDER WAS PREDICATED.

When modifying a long-term protective order against a woman's ex-husband to accommodate a change in the parties' living arrangements, the superior court also modified the order's factual findings about domestic violence. The woman argued that the superior court erred by modifying the factual findings of domestic violence underlying an unappealed final order. The Alaska Supreme Court agreed, holding that "a court's authority to modify or dissolve a final and unappealed long-term protective order to reflect changes in circumstances does not authorize the court to change or eliminate the factual findings on which the order was predicated." The Court noted that AS 18.66.120(a) sets no explicit limits on a court's authority to modify protective orders and that the legislative history of AS 18.66.120 "supports an intent to make modifications and dissolutions of protective orders relatively easy to obtain." However, the Court reasoned that while claims of factual error in a final order are subject to appeal, they are not ordinarily subject to relitigation. Furthermore, the Court determined that the statute's context demonstrates that a modification may not undercut the order's factual basis.

Ruerup v. Ruerup, 408 P.3d 1203 (Alaska 2018).

No legislative action is recommended, unless the legislature wishes to allow courts to change or eliminate the factual findings on which a final and unappealed long-term protective order was predicated.

AS 18.80.060
AS 44.62.590

THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS MAY EXCLUDE THIRD PARTIES FROM INVESTIGATIVE INTERVIEWS.

A state worker complained of workplace discrimination. The Alaska State Commission for Human Rights issued a subpoena to interview the complainant's supervisor, who refused to be interviewed unless an employer representative was also present. The Alaska Supreme Court held that the commission's investigations, mandated as confidential by AS 18.80.115, necessarily entails the authority to conduct confidential interviews. The Court found that the commission's longstanding policy of excluding third parties from informal witness interviews was a commonsense interpretation of the statutory requirement that it maintain the confidentiality of its investigative records and information. The Court held that the supervisor did not satisfy the subpoena, which required appearance to provide testimony.

Buscaglia v. Anderson, 2018 WL 4177932 (Alaska Aug. 31, 2018).

Legislative review is not recommended unless the legislature wishes to address the exclusion of third parties from the commission's investigations.

AS 18.85.100(a)(2)
AS 44.21.410(a)(5)

THE PUBLIC DEFENDER AGENCY AND THE OFFICE OF PUBLIC ADVOCACY MUST PAY NECESSARY TRIAL TRAVEL EXPENSES FOR THEIR INDIGENT DEFENDANTS WHO ARE NOT IN CUSTODY AND CANNOT AFFORD TRAVEL.

A minor indigent defendant in a delinquency proceeding living in the village of Marshall and represented by the Public Defender Agency (Agency) will have a trial in Bethel. The defendant's family is unable to afford the defendant's transport to Bethel and, because the defendant is a minor, the defendant's parents aver that one of them must accompany the defendant. The superior court ordered the Agency to pay the travel expense, reasoning that the expense was one of the "necessary services and facilities of [the Agency's] representation" of the defendant under paragraph (a)(2) of AS 18.85.100, the authorizing statute of the Agency. The Agency appealed, arguing that the Division of Juvenile Justice or the Court System should pay the transportation expense.

The Alaska Court of Appeals acknowledged there is more than one possible interpretation of the statute, and discussed the statute in conjunction with AS 44.21.410, the parallel authorizing statute of the Office of Public Advocacy (OPA). The court noted that two Alaska Attorney General opinions issued in 1977 and 1978 concluded that when an indigent defendant is represented by the Agency, the Agency must pay for the defendant's necessary transportation costs. The court further noted that a Department of Administration regulation that cites AS 44.21.410 as authority authorizes OPA to pay necessary travel of a defendant represented by the office, and AS 42.21.410(a)(5) requires OPA to provide the same legal representation that an indigent person would receive from the Agency. The court found that because the case presented an administrative question of which government entity is responsible for the costs in question, substantial weight should be given to the statutory interpretations of the Attorney General and the Department of Administration. The court held that when the Agency or OPA represents an indigent defendant who is not in custody and is unable to afford the travel costs for trial, the respective agency shall pay the necessary expense. The court further held that when a delinquency case involves a minor who is not reasonably able to travel alone, the respective agency shall pay the travel costs for a parent or guardian to accompany the minor.

Alaska Pub. Def. Agency v. Superior Court, 413 P.3d 1221 (Alaska App. 2018).

No legislative action is recommended, unless the legislature intended that a different government entity pay the travel expenses of indigent minor defendants.

AS 23.30.008(d)

THE SHIELD AGAINST AN AWARD OF ATTORNEY'S FEES UNDER THE ALASKA WORKERS' COMPENSATION ACT EXTENDS TO CLAIMANTS OTHER THAN INJURED WORKERS.

After her daughter was killed on the job, a mother sought workers' compensation death benefits or other damages. Representing herself, the mother brought a claim before the Alaska Workers' Compensation Board, arguing in part that the Alaska Workers' Compensation Act was unconstitutional. The Board denied her claim. The Alaska Workers' Compensation Appeals Commission affirmed the Board's decision and ordered her to pay the employer's attorney's fees and costs. On

appeal, the Alaska Supreme Court held that the mother's constitutional rights were not violated by the Act, but the Commission erred in awarding attorney's fees to the employer. Under AS 23.30.008(d), the Commission "may not make an award of attorney fees against an injured worker" absent a finding "that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith." The Court noted that the term "injured worker" is not defined and is used only sporadically in the Act. The Court found that the scant legislative history suggests that the legislature intended Commission attorney's fees awards to follow the same rules as appellate attorney's fees awards. The Court considered other statutory restrictions on fee arrangements under the Act and determined that because these statutes do not distinguish between injured workers and others, "claimants, not just injured workers, are entitled to protection of the shield against an award of attorney's fees." The Court found that the mother, in asserting constitutional claims as a possible beneficiary of a deceased worker, was a claimant under the Act. The Court, noting the mother's self-represented status and jurisdictional issues, held that her appeal to the Commission was not frivolous, unreasonable, or in bad faith.

Burke v. Raven Electric, Inc., 420 P.3d 1196 (Alaska 2018).

Legislative review is not recommended, unless the legislature wishes to narrow those who are shielded from an award of attorney's fees under the Alaska Workers' Compensation Act.

AS 23.30.015(h)

UNDER AS 23.30.015(h), "COMPROMISE" IS AN AGREEMENT TO SETTLE A REAL OR SUPPOSED CLAIM IN WHICH EACH PARTY SURRENDERS SOMETHING IN CONCESSION TO THE OTHER.

A taxi driver was injured in a car accident while working. He filed a report of injury with the Alaska Workers' Compensation Board (board), but his employment relationship was disputed. The taxi driver retained an attorney for a tort suit against the other driver, settling that claim with the driver's insurance company without the taxi company's approval. Because the taxi company did not have workers' compensation insurance, the Alaska Workers' Compensation Benefits Guaranty Fund (fund) assumed responsibility for adjusting the workers' compensation claim. Under AS 23.30.015(h), "[i]f compromise with a third person is made by the person entitled to compensation . . . of an amount less than the compensation to

which the person . . . would be entitled, the employer is liable for compensation" under the Alaska Workers' Compensation Act (Act) "only if the compromise is made with the employer's written approval." Relying on this statute, the board dismissed the taxi driver's claim because of the unapproved settlement, and the Alaska Workers' Compensation Appeals Commission (commission) affirmed.

On appeal, the taxi driver and the fund disagreed on what constitutes a compromise under AS 23.30.015(h). The Alaska Supreme Court determined there is no legislative history readily available. Noting that "compromise" is not defined in the Act, the Court concluded that the relevant definition of compromise in Black's Law Dictionary is "[a]n agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." The Court found that the agreement between the taxi driver and the other driver's insurer met this definition. Because the taxi driver did not obtain his employer's approval before settling with the estate, the Court affirmed the commission's decision.

Atkins v. Inlet Transportation & Taxi Serv., Inc., 2018 WL 4517977 (Alaska Sept. 21, 2018).

Legislative review is not recommended unless the legislature wishes to change the written approval requirement.

AS 23.30.055

THE ALASKA WORKERS' COMPENSATION ACT DOES NOT PRECLUDE COMPENSATION FOR ALL INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS.

A woman sued the North Slope Borough, raising several claims including wrongful discharge and intentional infliction of emotional distress, following her termination as a division manager of administration for the borough police department. She sought compensatory damages for lost wages, employment benefits, retirement benefits, and emotional distress. The borough filed for summary judgment on the woman's intentional infliction of emotional distress claim, arguing that AS 23.30.055, the exclusivity provision of the Alaska Workers' Compensation Act (Act), barred the claim. The woman argued that "[n]ot all damages claims arising in the workplace are swept up in the ambit of workers

compensation, especially where the damages claimed are in a category that the act does not cover" and cited *VECO v. Rosebrock*, 970 P.2d 917 (Alaska 1999). In *VECO*, the Alaska Supreme Court held that damages for emotional distress caused by sexual harassment in the workplace are not barred by the exclusivity provision of the Act. The United States District Court held that while the woman's case does not involve sexual harassment, the rationale behind *VECO* supports a reading of the Act as not precluding damages for an intentional infliction of emotional distress claim. The court concluded that the Alaska Supreme Court would likely find that the exclusivity provision does not bar the woman's claim for intentional infliction of emotional distress. The court reasoned that the exclusivity provision of the Act is based on preventing a worker from receiving a worker's compensation award and a duplicative damage award. But the court explained that, as the Alaska Supreme Court noted in *VECO*, the Act does not provide compensation for emotional distress not resulting in permanent or partial disability. The court reasoned that this means that the woman's intentional infliction of emotional distress claim does not present the concerns on which the exclusivity provision is based. The court therefore denied the borough's motion for summary judgment on that claim.

Booth v. N. Slope Borough, 2018 WL 3520674 (D. Alaska July 20, 2018).

Legislative review is recommended to determine whether the courts' holding that the exclusivity provision of the Alaska Workers' Compensation Act likely does not bar this type of claim is consistent with legislative intent.

AS 33.30.295
22 AAC 05.480

ISSUE EXHAUSTION REQUIREMENT DOES NOT NECESSARILY APPLY TO A PRISON DISCIPLINARY APPEAL.

The Department of Corrections (DOC) charged an inmate with making a false statement to a staff member. DOC denied the inmate's timely request for three witnesses at his disciplinary hearing and found the inmate guilty. On appeal to the superintendent, the inmate argued that he never made a false statement, but did not raise any procedural concerns. The inmate then appealed to the superior court, arguing that DOC violated his due process rights by refusing to allow him to call witnesses at his disciplinary hearing. The superior court

affirmed DOC, finding that the inmate waived his procedural claims by failing to raise them to the superintendent.

On appeal, the Alaska Supreme Court noted that it had previously held in *James v. State, Department of Corrections* that the issue exhaustion requirement applied to prison disciplinary appeals. However, the Court decided to reconsider the application of an issue exhaustion requirement to prison disciplinary appeals. The Court found that AS 33.30.295, the statute that governs appeals from a final DOC decision, and 22 AAC 05.480, the regulation that governs the intra-agency appeal process, do not mandate an issue exhaustion requirement. The Court rejected the state's argument that an issue exhaustion requirement is inherent in the requirement that prisoner appellants exhaust administrative remedies. The Court held that prisoners who fail to raise their constitutional claims during the administrative appeal process do not necessarily forfeit those claims and overruled *James* to the extent it is inconsistent with that holding. The Court reasoned that prisoners have no notice of an issue exhaustion requirement, most prisoners lack time and expertise for constitutional claims, and superintendents do not have special expertise on constitutional claims. The Court noted that the inmate raised his constitutional claim during the initial stages of the disciplinary process and declined to decide whether issue exhaustion applies to issues that a prisoner deliberately ignores or never brings to DOC's attention.

Walker v. State, Dep't of Corr. 421 P.3d 74 (Alaska 2018).

Legislative review is recommended if the legislature wants to require issue exhaustion for prison disciplinary appeals.

AS 34.40.110(k)

AS 34.40.110(k) CANNOT UNILATERALLY DEPRIVE OTHER STATE AND FEDERAL COURTS OF JURISDICTION.

After a Montana state court issued a series of judgments against Donald Tangwall and his family, the family members transferred two pieces of property to a trust allegedly created under Alaska law. A Montana state court and a federal bankruptcy court in Alaska found that the transfers were made to avoid the judgments and were therefore fraudulent. Tangwall then sought relief in Alaska state court, arguing that Alaska state courts have exclusive jurisdiction over such fraudulent transfer actions under AS 34.40.110(k). The

superior court dismissed the complaint.

On appeal, the Alaska Supreme Court noted that the wording and legislative history of AS 34.40.110(k) clearly show that the legislature intended to prevent other state and federal courts from exercising subject matter jurisdiction over fraudulent transfer claims against certain trusts. Relying on two United States Supreme Court cases, *Tennessee Coal v. George* and *Marshall v. Marshall*, the Court reasoned that a state cannot deprive other states or the federal courts of jurisdiction over transitory actions (an action which could have taken place anywhere). The Court concluded that fraudulent transfer actions are transitory actions (fraudulent transfers of property can take place anywhere even for immovable property) and thus held that AS 34.40.110(k) cannot restrict another state's or a federal court's jurisdiction. The Court also noted that interpreting AS 34.40.110(k) to deny parties access to the federal courts without the courts' consent may violate the Supremacy Clause because 28 U.S.C. § 1334(c) and 11 U.S.C. § 548(a)(1)(A) grant federal courts jurisdiction over some of the claims at issue in this case. The Court affirmed the superior court's decision to dismiss Tangwall's complaint.

Toni 1 Tr. by Tangwall v. Wacker, 413 P.3d 1199 (Alaska 2018).

Legislative review is recommended to determine whether AS 34.40.110(k) should be amended.

AS 40.25.120(a)(6)(A)
AS 40.25.122

**THE PUBLIC RECORDS ACT LITIGATION
EXCEPTION ONLY APPLIES TO LITIGATION
INVOLVING A PUBLIC AGENCY AND THE LAW-
ENFORCEMENT-INTERFERENCE EXCEPTION
ONLY APPLIES IF THE STATE SHOWS
DISCLOSURE COULD REASONABLY BE EXPECTED
TO INTERFERE WITH ENFORCEMENT
PROCEEDINGS.**

Basey, the defendant in a federal criminal case, brought a related federal civil rights lawsuit against more than a dozen individuals, including Alaska State Trooper (AST) officers, based on their alleged actions during the investigation and his arrest. AST denied two public records requests filed by Basey. Basey subsequently filed a complaint in superior court to compel AST to produce the records. The superior court granted the state's motion to dismiss, which asserted that the

records fell under two statutory exceptions to the Public Records Act, AS 40.25.120(a)(6)(A) and AS 40.25.122.

On appeal to the Alaska Supreme Court, Basey argued that the litigation exception under AS 40.25.122 is inapplicable as it only applies to litigation with a public agency and he was involved with individual state officers who he sued in their personal capacity. The state's argument implied that the exception applies whenever the requestor is involved in litigation regardless of whether a public agency is a party to the litigation. The Court considered the construction and legislative history of the litigation exception under AS 40.25.122, and prior attorney general opinions, and held that the exception only applies to litigation involving a public agency. Because the state did not argue that Basey's cases involved a public agency in some way other than as a party to the case, the Court declined to decide that possibility. The Court concluded that the state failed to show Basey's litigation involved a public agency and held that it was error for the superior court to grant the state's motion to dismiss under AS 40.25.122. The Court also determined that the state cannot invoke the law-enforcement-interference exception under AS 40.25.120(a)(6)(A) merely by pointing to a pending criminal case involving the requestor. Because the state did not offer any evidence showing that the records disclosure could reasonably be expected to interfere with the federal proceeding, the Court held that dismissing Basey's complaint pursuant to AS 40.25.120(a)(6)(A) was error.

Basey v. State Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations, 408 P.3d 1173 (Alaska 2017).

Legislative review is not recommended.

AS 45.45.010

AS 45.45.010 DOES NOT SET A MAXIMUM INTEREST RATE FOR A CONTRACT OR LOAN COMMITMENT WITH AN EXPRESS INTEREST RATE AND PRINCIPAL THAT EXCEEDS \$25,000.

The Coopers loaned Cox \$325,000 with a 20% annual interest rate, which was later lowered to 8%, and Cox provided his house as security. After the trustee of the Coopers' estate gave notice of default and sale and foreclosure, Cox filed a complaint alleging that the 20% interest rate was usurious under AS 45.45.010. Under subsection (a), the maximum

interest rate for loans in the state is 10.5% a year, except as provided in subsection (b). The first sentence of subsection (b) sets the maximum interest rate that may be charged by express agreement of the parties in a contract or loan commitment. The second sentence states: "A contract or loan commitment in which the principal amount exceeds \$25,000 is exempt from the limitation of this subsection." The superior court held that AS 45.45.010 does not limit interest rates for contract or loan commitments over \$25,000.

On appeal, Cox argued that AS 45.45.010(a) provides the general interest rate for all loans not covered by AS 45.45.010(b). Cox contended that because the second sentence of subsection (b) provides that (b) does not cover loans greater than \$25,000, subsection (a) applies to all loans that exceed \$25,000. The Alaska Supreme Court rejected Cox's argument and agreed with the Cooper's estate, finding that "the legislature did not intend loans exempt from the limitation of subsection (b) to be governed by the interest rate in subsection (a). Rather, subsection (b) governs all contract or loan commitments with an express interest rate, and subsection (a) applies only to debts where no interest rate was specified." The Court noted that while it had not before directly addressed whether AS 45.45.010 sets a maximum interest rate for loans over \$25,000, the Court's past cases consistently assumed it does. The Court held that "AS 45.45.010 does not prohibit parties from contracting for any interest rate in contract or loan commitments with a principal exceeding \$25,000." Because the loan in this case exceeded \$25,000, the Court concluded the 20% annual interest rate was not usurious.

Cox v. Estate of Cooper, 2018 WL 4374849 (Alaska Sept. 14, 2018).

Legislative review is not recommended unless the legislature wishes to establish a maximum legal interest rate for contract or loan commitments with express interest rates in which the principal exceeds \$25,000.

AS 47.10.080(f)
AS 47.10.100(a)

SUPERIOR COURTS MAY AT ANY TIME STAY EXECUTION, GRANT A NEW HEARING, OR SET ASIDE A PARENTAL RIGHTS TERMINATION JUDGMENT UPON A PARENT'S APPLICATION.

Dara appealed the termination of her parental rights and moved for a review hearing under the Alaska Supreme Court's

1981 case *Rita T. v. State*. Following the hearing, Dara's parental rights were reinstated. The Court outlined existing case law and examined relevant statutory changes since the *Rita T.* decision. The Court revisited issues that arose in *Rita T.*, where it held that a parent whose parental rights have been terminated retains the right, upon a showing of good cause, to request a review hearing, during which the parent may seek to set aside a termination order and have parental rights reinstated. Despite statutory changes, the Court held that existing case law regarding reinstatement of parental rights "retains vitality." The Court held that at a *Rita T.* hearing, a termination order can be set aside by clear and convincing evidence that the parent has been sufficiently rehabilitated and is capable of providing the care and guidance that will serve the child's moral, emotional, mental, and physical welfare, and that parental rights reinstatement is in the child's best interest. The Court stated that a *Rita T.* hearing request should generally arise only when a parent and OCS engage in post-termination permanency discussions and OCS rejects the parent's proposal for reinstatement of parental rights. A *Rita T.* hearing would focus on a contested permanency plan. The Court held that the actual adoption or legal guardianship of a child is the correct place to draw the line after which a parent can no longer apply for a *Rita T.* hearing, and left the problem that arises when a parent seeks to stay an adoption pending *Rita T.* proceedings to the discretion of superior court judges.

Dara S. v. State of Alaska, Dep't. of Health & Soc. Servs., Office of Children's Servs., 2018 WL 4319504 (Alaska Sept. 7, 2018).

Legislative review is not recommended unless the legislature wishes to clarify the procedure for reunification after a termination of parental rights.

AS 47.10.100
AS 47.10.083

JURISDICTION OVER A CHILD IN NEED OF AID PROCEEDING DERIVES FROM CHILD'S STATUS AS A CHILD IN NEED OF AID, NOT CUSTODY.

The Office of Children's Services (OCS) had temporary custody of a child in need of aid. After the child was returned to her mother, OCS filed a motion for removal findings stating that the child had been removed from her parents' home, which the court authorized. OCS then filed a petition to extend custody for one year, pursuant to AS 47.10.080(c)(1)(A). The child's father filed an expedited motion to dismiss, arguing the

court no longer had jurisdiction over the child because OCS's petition was untimely. The superior court granted the father's motion and ordered the child released from OCS custody. OCS then filed a new emergency petition to adjudicate the child a child in need of aid, arguing that the court's granting the motion to dismiss created the emergency. The court dismissed the new petition, stating that although it was concerned for the child and granting the motion to dismiss was not in the child's best interest, it could not retroactively extend a custody order.

The Alaska Supreme Court found it was error for the superior court to dismiss OCS's petition based on a lack of jurisdiction. The Court expanded its holding in an earlier case that recognized that the superior court's authority over a CINA proceeding is not dependent on an existing disposition order. A disposition order confers authority to OCS over a child adjudicated a child in need of aid, but does not impact a court's authority to hear and decide matters regarding the child. The Court clarified that in the earlier case, the superior court's renewed finding that a child was a child in need of aid did not "reestablish" the court's jurisdiction over the child. Instead, the court never lost jurisdiction. The Court reasoned that the expansive breadth of the Court's authority over CINA proceedings is emphasized in AS 47.10.100 and, for hearings related to extended commitment and supervision, AS 47.10.083. Based on these statutes, the Court held that jurisdiction is distinct from the custody granted to OCS in a disposition order. The court's authority is not lost even if it determines that a child is no longer in need of aid. Instead, the Court held that the superior court's authority in a CINA proceeding derives from the child's adjudicated status as a child in need of aid and *not* from a disposition order. To find otherwise would read into the statutes a jurisdictional limit that is inconsistent with the statutory text and ignore the child's best interests. The Court held that AS 47.10.083 required the superior court to act in the child's best interests and determine whether returning her to her parents' would have been detrimental.

State Dep't. of Health & Soc. Servs., Office of Children's Servs. v. Michelle P., 411 P.3d 576 (Alaska 2018).

Legislative review is not recommended.

AS 47.30.655(6)
AS 47.30.730(a)(3)

THE STATE MUST SHOW AN EXPECTATION OF IMPROVEMENT BY CLEAR AND CONVINCING EVIDENCE WHEN IT SEEKS INVOLUNTARY COMMITMENT ON A THEORY OF GRAVE DISABILITY.

A jury found the state had proved by clear and convincing evidence that Darren M. was both mentally ill and gravely disabled. The superior court held an evidentiary hearing on two remaining issues: whether there was reason to believe treatment could improve Darren's condition and whether involuntary commitment at the Alaska Psychiatric Institute (API) was the least restrictive alternative. The court then ordered Darren M. to API for 90 days, finding that the state met its burden to prove by clear and convincing evidence that treatment could improve Darren M. and there was no less-restrictive alternative.

On appeal, the Alaska Supreme Court held that the superior court applied the correct legal standard to the chance-of-improvement issue. The Court reasoned that, as expressed in AS 47.30.655(6), one of the principles underlying the 1981 revision of Alaska's involuntary commitment statutes was "that persons who are mentally ill but not dangerous to others be committed only if there is a reasonable expectation of improving their mental condition." Under AS 47.30.730(a)(3), a petition for involuntary commitment "must allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought." The Court addressed this issue in a 2009 case, *E.P. v. Alaska Psychiatric Institute*, when it concluded that the statement of purpose in AS 47.30.655(6) conflicts with the substantive statutes regarding the required allegations and the substantive statutes control, and the state need not show a likelihood that treatment will improve the condition of a mentally ill person who poses a danger to himself. The Court clarified that the underlying assumption in *E.P.* that the state *is* required to show an expectation of improvement in the case of a gravely disabled person is correct. The Court found that the state, API, and the Public Defender Agency have operated under this assumption at least since *E.P.* was decided. Therefore, the Court held that when the state seeks to commit a mentally ill person on a theory of grave disability, it must prove a reasonable expectation of improvement with treatment by clear and convincing evidence. The Court based its decision on the guidance in the language of the commitment statutes and

reasoned that requiring the state to prove treatment *definitely* would improve a person's condition would be too strict.

Matter of Darren M., 2018 WL 4374718 (Alaska Sept. 14, 2018).

Legislative review is not recommended.

SUBJECT INDEX FOR COURT CASES

Alaska Public Offices Commission, 33
appellate procedure, 7
attorney fees, 16, 38
attorneys, 9
boards and commissions, 12
child in need of aid, 45
Commission for Human Rights, 37
contracts, 8, 44
corrections, 41
courts, 8, 42
crime/criminal procedure, 5, 10, 19, 21,
22, 23, 26, 28, 29, 30, 31, 37
criminal law, 4, 18, 24
custody, 46
domestic violence, 35
double jeopardy, 5
elections, 5, 33
evidence, 11, 34
ex post facto law, 23
families, 46
health and social services, 46
immunity, 17
initiatives, 6
interest rates, 44
involuntary commitment, 48
jurisdiction, 42
litigation, 3, 16, 38
medical malpractice, 34
municipalities, 28
nuisance, 13
parental rights, 45
prisoner litigation, 41
probate, 15, 32
probation, 26
protective orders, 36
public records, 9, 43
sentencing, 22, 26, 28, 29
sex offender registry, 31
torts, 3, 8, 40
trusts, 42
usury, 44
venue, 8
workers' compensation, 38, 39, 40
workplace discrimination, 37

INDEX BY ALASKA STATUTE REFERENCES IN CASES ANALYZED

12 AAC 42.990	12	AS 12.63.100(6)(C)	31
22 AAC 05.480	41	AS 13.12.114	32
Alaska Appellate Rule 404(f)	7	AS 13.12.403	32
Alaska Civil Rule 3(c)(1), Alaska Civil Rule 12(b)	8	AS 13.16.015	15
Alaska Criminal Rule 23(a)	10	AS 13.16.245 - 13.16.440	15
Alaska Rule of Evidence 503(b)	9	AS 15.13.145(a)(4)	33
Alaska Rule of Evidence 505	11	AS 18.23.030	34
Art. I, sec. 5, Constitution of the State of Alaska	5	AS 18.66.100	35
Art. I, sec. 9, Constitution of the State of Alaska	5	AS 18.66.120	36
Art. XI, sec. 7, Constitution of the State of Alaska	6	AS 18.80.060	37
AS 08.45	12	AS 18.85.100(a)(2)	37
AS 09.45.235	13	AS 22.10.040	8
AS 09.55.570	15	AS 23.30.008(d)	38
AS 09.60.010	16	AS 23.30.015(h)	39
AS 09.65.070(d)(2)	17	AS 23.30.055	40
AS 11.41.110(a)(3)	18	AS 25.20.050	32
AS 11.41.210(a)(1)	5	AS 28.35.400	28
AS 11.41.220(a)(2)	19	AS 33.30.295	41
AS 11.41.500(a)(3)	5	AS 34.40.110(k)	42
AS 11.46.310(a)	21	AS 40.25.120(a)(4) Alaska Civil Rule 26(b)(3)	9
AS 11.56.757	22	AS 40.25.120(a)(6)(A)	43
AS 11.56.760	23	AS 40.25.122	43
AS 11.56.800(a)(2)	21	AS 44.21.410(a)(5)	37
AS 11.81.900(b)(5)	21	AS 44.41.035	23
AS 12.55.027(d)	22, 24, 26	AS 44.62.590	37
AS 12.55.125(o)	26	AS 45.45.010	44
AS 12.55.135(a)	28	AS 47.10.080(f)	45
AS 12.55.145(a)(1)(B)	29	AS 47.10.083	46
AS 12.55.155(c)(18)(A)	30	AS 47.10.100	46
		AS 47.10.100(a)	45
		AS 47.30.655(6)	48
		AS 47.30.730(a)(3)	48

INDEX OF CASES ANALYZED

Cases

<i>Alaska Ass'n of Naturopathic Physicians v. State Dep't of Commerce</i> , 414 P.3d 630 (Alaska 2018).....	12-13
<i>Alaska Pub. Def. Agency v. Superior Court</i> , 413 P.3d 1221 (Alaska App. 2018).....	37-38
<i>Arredondo v. State</i> , 411 P.3d 640 (Alaska App. 2018).....	11-12
<i>Atkins v. Inlet Transportation & Taxi Serv., Inc.</i> , 2018 WL 4517977 (Alaska Sept. 21, 2018).....	39-40
<i>Basey v. State Dep't of Pub. Safety, Div. of Alaska State Troopers</i> , <i>Bureau of Investigations</i> , 408 P.3d 1173 (Alaska 2017).	43-44
<i>Belknap v. State</i> , 2018 WL 3597570 (Alaska App. July 27, 2018).	26
<i>Booth v. N. Slope Borough</i> , 2018 WL 3520674 (D. Alaska July 20, 2018).	40-41
<i>Brooks Range Petroleum Corp. v. Shearer</i> , 425 P.3d 65 (Alaska 2018).....	8-9
<i>Brown v. State</i> , 425 P.3d 216 (Alaska App. 2018).	29
<i>Burke v. Raven Electric, Inc.</i> , 420 P.3d 1196 (Alaska 2018).	38-39
<i>Chinuhuk v. State</i> , 413 P.3d 1215 (Alaska App. 2018).	26-27
<i>Coleman v. State</i> , 407 P.3d 502 (Alaska App. 2017).	21-22
<i>Cox v. Estate of Cooper</i> , 2018 WL 4374849 (Alaska Sept. 14, 2018).	44-45
<i>Dara S. v. State of Alaska, Dep't. of Health & Soc. Servs., Office of</i> <i>Children's Servs.</i> , 2018 WL 4319504 (Alaska Sept. 7, 2018).	45-46
<i>Eberhart v. Alaska Pub. Offices Comm'n</i> , 2018 WL 4041135 (Alaska Aug. 24, 2018).....	33-34
<i>Griswold v. Homer City Council</i> , 2018 WL 4375455 (Alaska Sept. 14, 2018).	9-10
<i>Harrold-Jones v. Drury</i> , 422 P.3d 568 (Alaska 2018), reh'g denied (Aug. 9, 2018).	3-4
<i>Hester v. Landau</i> , 420 P.3d 1285 (Alaska 2018).....	15
<i>Lane v. City & Borough of Juneau</i> , 421 P.3d 83 (Alaska 2018).	17-18
<i>Larson v. State</i> , 407 P.3d 520 (Alaska App. 2017), reh'g denied (May 1, 2018).	7-8

<i>Mallott v. Stand for Salmon</i> , 2018 WL 3751013 (Alaska Aug. 8, 2018).	6-7
<i>Manning v. State</i> , 420 P.3d 1270 (Alaska 2018).	16-17
<i>Mat-Su Valley Medical Center, LLC v. Bolinder</i> , 2018 WL 4374851 (Alaska Sept. 14, 2018).	34-35
<i>Matter of Darren M.</i> , 2018 WL 4374718 (Alaska Sept. 14, 2018).	48-49
<i>Matter of Estate of Seward</i> , 424 P.3d 333 (Alaska 2018).	32-33
<i>Municipality of Anchorage v. Beezley</i> , 2018 WL 3947108 (Alaska App. Aug. 17, 2018).	28-29
<i>Pfister v. State</i> , 2018 WL 2273046 (Alaska App. May, 2018).	18-19
<i>Riddle v. Lanser</i> , 421 P.3d 35 (Alaska 2018).	13-14
<i>Ruerup v. Ruerup</i> , 408 P.3d 1203 (Alaska 2018).	36
<i>Saunders v. State</i> , 413 P.3d 1241 (Alaska App. 2018).	19-20
<i>Simmons v. State Dep't. of Corr.</i> , 2018 WL 4374714 (Alaska Sept. 14, 2018).	23-24
<i>Smith v. State</i> , 2018 WL 3597804 (Alaska App. July 27, 2018).	5-6
<i>State Dep't. of Health & Soc. Servs., Office of Children's Servs. v. Michelle P.</i> , 411 P.3d 576 (Alaska 2018).	46-47
<i>State v. Alaska Democratic Party</i> , 2018 WL 4041195 (Alaska Aug. 24, 2018).	5
<i>State v. Bell</i> , 421 P.3d 128 (Alaska App. 2018).	24-26
<i>State v. Nicori</i> , 407 P.3d 518 (Alaska App. 2017).	4
<i>State v. Thompson</i> , 425 P.3d 166 (Alaska App. 2018).	22-23
<i>State, Dep't of Pub. Safety v. Doe</i> , 425 P.3d 115 (Alaska 2018).	31
<i>Tofelogo v. State</i> , 408 P.3d 1215 (Alaska App. 2017).	30
<i>Toni I Tr. by Tangwall v. Wacker</i> , 413 P.3d 1199 (Alaska 2018).	42-43
<i>Treptow v. State</i> , 408 P.3d 1220 (Alaska App. 2017).	10-11
<i>Walker v. State, Dep't of Corr.</i> 421 P.3d 74 (Alaska 2018).	41-42
<i>Whalen v. Whalen</i> , 2018 WL 3800115 (Alaska Aug. 10, 2018).	35-36